Supreme Court, U.S.
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No. ____

IN THE

Supreme Court of the United States

JOHN SORABELLA III
Petitioner,

v.

STATE OF CONNECTICUT,
Respondent,

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF CONNECTICUT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether, in the context of an Internet sting operation in which a police officer posed as a thirteen year old girl, the petitioner's Due Process rights were violated by the state supreme court's conclusions that (1) attempt to commit sexual assault in the second degree ("statutory rape") and attempt to commit risk of injury to a child, are cognizable crimes; (2) the statutes were not void for vagueness, and were not construed in a manner that violated the principles of *Bouie v. City of Columbia*, 378 U.S. 347 (1964); and (3) traveling to a public location to meet the fictitious "girl" constituted the "substantial step" required for attempt liability?

II. Whether, in a prosecution for importing child pornography based on two digital photographic images of an unidentified young female, the Due Process Clause requires some measure of reliable evidence, beyond the images themselves, to prove that the person depicted is an actual person, under the age of sixteen?

III.. Whether, under a statute that prohibits "knowingly" enticing a person under sixteen years of age to engage in illegal sexual activity, the Due Process Clause permits conviction of an *attempt* to commit such crime, on the basis of evidence proving only the *less culpable* mental state of "believing" that the person was under sixteen years of age?

IV. Whether a state obscenity conviction is constitutionally valid, where the jury was not required unanimously to agree on the obscene nature of any specific item, and the state supreme court could not discharge its constitutional responsibility independently to review the jury's finding of obscenity?

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF CONNECTICUT

The petitioner, John Sorabella III, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Connecticut Supreme Court, rendered on February 7, 2006.

OPINIONS BELOW

The opinion of the Connecticut Supreme Court is officially reported at 277 Conn. 155 (2006), and is reprinted in the Appendix to this petition, at pp. 1a-62a. The opinion is unofficially reported at 891 A.2d 897.

JURISDICTION

The judgment of the Connecticut Supreme Court was entered on February 7, 2006. On March 14, 2006, the Connecticut Supreme Court issued an Order denying petitioner's timely motion for reargument or reconsideration. App. 63a. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(a), on the grounds that the State of Connecticut has violated the petitioner's rights under the Sixth and Fourteenth Amendments to the Constitution of the United States.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the Constitution of the United States provides in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . ."

The Fourteenth Amendment to the Constitution of the

United States provides in pertinent part: ". . . nor shall any State deprive any person of life, liberty or property, without due process of law; . . . ."

Conn. Gen. Stat. (Rev. to 1999) § 53-21 provides in part: "Any person who (1) wilfully or unlawfully causes or permits any child under the age of sixteen years to be placed in such a situation that the life or limb of such child is endangered, the health of such child is likely to be injured or the morals of such child are likely to be impaired, or does any act likely to impair the health or morals of any such child, or (2) has contact with the intimate parts, as defined in section 53a-65, of a child under the age of sixteen years or subjects a child under sixteen years of age to contact with the intimate parts of such person, in a sexual and indecent manner likely to impair the health or morals of such child, . . . shall be guilty of a class C felony."

Conn. Gen. Stat. § 53a-49 provides: "(a) A person is guilty of an attempt to commit a crime if, acting with the kind of mental state required for commission of the crime, he: (1) Intentionally engages in conduct which would constitute the crime if attendant circumstances were as he believes them to be; or (2) intentionally does or omits to do anything which, under the circumstances as he believes them to be, is an act or omission constituting a substantial step in a course of conduct planned to culminate in his commission of the crime.

(b) Conduct shall not be held to constitute a substantial step under subdivision (2) of subsection (a) of this section unless it is strongly corroborative of the actor's criminal purpose. Without negating the sufficiency of other conduct, the following, if strongly corroborative of the actor's criminal purpose, shall not be held insufficient as a matter of law: (1) Lying in wait, searching for or following the contemplated

victim of the crime; (2) enticing or seeking to entice the contemplated victim of the crime to go to the place contemplated for its commission; (3) reconnoitering the place contemplated for the commission of the crime; (4) unlawful entry of a structure, vehicle or enclosure in which it is contemplated that the crime will be committed; (5) possession of materials to be employed in the commission of the crime, which are specially designed for such unlawful purpose or which can serve no lawful purpose of the actor under the circumstances; (6) possession, collection or fabrication of materials to be employed in the commission of the crime, at or near the place contemplated for its commission, where such possession., collection or fabrication serves no lawful purpose of the actor under the circumstances; (7) soliciting an innocent agent to engage in conduct constituting an element of the crime.

(c) When the actor's conduct would otherwise constitute an attempt under subsection (a) of this section, it shall be a defense that he abandoned his effort to commit the crime or otherwise prevented its commission, under circumstances manifesting a complete and voluntary renunciation of his criminal purpose."

Conn. Gen. Stat. § 53a-51 provides: "Attempt and conspiracy are crimes of the same grade and degree as the most serious offense which is attempted or is an object of the conspiracy, except that an attempt or conspiracy to commit a class A felony is a class B felony."

Conn. Gen. Stat. § 53a-71 provides in part: "(a) A person is guilty of sexual assault in the second degree when such person engages in sexual intercourse with another person and: (1) Such other person is thirteen years of age or older but under sixteen years of age and the actor is more than two years older than such person; . . . .

(b) Sexual assault in the second degree is a class C felony or, if the victim of the offense is under sixteen years of age, a class B felony, and any person found guilty under this section shall be sentenced to a term of imprisonment of which nine months of the sentence imposed may not be suspended or reduced by the court."

Conn. Gen. Stat. § 53a-90a(a) provides: "(a) A person is guilty of enticing a minor when such persons uses an interactive computer service to knowingly persuade, induce, entice or coerce any person under sixteen years of age to engage in prostitution or sexual activity for which the actor may be charged with a criminal offense. For purposes of this section, 'interactive computer service' means any information service, system or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet and such systems operated or services offered by libraries or educational institutions.

(b) Enticing a minor is a class A misdemeanor for a first offense, a class D felony for a second offense and a class C felony for any subsequent offense."

Conn. Gen. Stat. (Rev. to 1999) § 53a-193 provides: "(1) Any material or performance is 'obscene' if, (A) taken as a whole, it predominantly appeals to the prurient interest, (B) it depicts or describes in a patently offensive way a prohibited sexual act, and (C) taken as a whole, it lacks serious literary, artistic, educational, political or scientific value. Predominant appeal shall be judges with reference to ordinary adults unless it appears from the character of the material or performance or the circumstances of its dissemination to be designed for some other specially susceptible audience. Whether a material or performance is obscene shall be judged by ordinary adults

applying contemporary community standards. In applying contemporary community standards, the state of Connecticut is deemed to the community.

* * *

(3) 'Prohibited sexual act' means erotic fondling, nude performance, sexual excitement, sado-masochistic abuse, masturbation or sexual intercourse.

(4) 'Nude performance' means . . the showing of the female breast with less than a fully opaque covering of any portion thereof below the top of the nipple . . .

* * *

(10) 'Material' means anything tangible which is capable of being used or adapted to arouse prurient, shameful or morbid interest, whether through the medium of reading, observation, sound or in any other manner . . .

(11) "Performance' means any play, motion picture, dance or other exhibition performed before an audience.

* * *

(13) 'Child pornography' means any material involving a live performance or photographic or other visual reproduction of a live performance which depicts a minor in a prohibited sexual act."

Conn. Gen. Stat. § 53a-194 provides: "(a) A person is guilty of obscenity when, knowing its content and character, he promotes, or possesses with intent to promote, any obscene material or performance.

(b) Obscenity is a class B misdemeanor."

Conn. Gen. Stat. (Rev. to 1999) § 53a-196c provides "(a) A person is guilty of importing child pornography when, with intent to promote child pornography, he knowingly imports or causes to be imported into the state any child pornography of known content and character.

(b) Importation of two or more copies of any publication containing child pornography shall be prima facie evidence that such publications were imported with intent to promote child pornography.

(c) Importing child pornography is a class C felony."

STATEMENT OF THE CASE

This case arose from an Internet sting operation conducted in 2000 by the police department in New Britain, Connecticut. It was the first Internet sting case to be tried in state court in Connecticut, and the first one to be reviewed by the Connecticut Supreme Court.

On January 4, 2000, New Britain Detective James Wardwell "assumed the persona of a thirteen year old girl and, using the screen name 'Danuta333,' entered an America Online (AOL) chat room entitled, 'I Love Much Older Men.'" *State v. Sorabella*, supra, 163, at App. 4a. Wardwell had also created an AOL profile for Danuta333, which described her "as a thirteen year old female from Connecticut." Id., at App. 4a-5a..

Wardwell exited from the chat room, and less than one minute later, he received an instant message from an individual, later identified as the petitioner, using the screen name "JoeSkotr." Id., at App. 5a. Within the first few lines of instant message dialogue, the petitioner described himself as a forty-two year old male from Massachusetts, and asked Danuta333

if his age was "an issue?" Danuita333 (Wardwell) responded, "is mine??????????," and the petitioner replied, "No." Id., at App. 5a. The ensuing discussion "covered a range of sexually explicit topics," and petitioner specifically questioned Danuta333 about her prior sexual experience. Id., at App. 6a. When the petitioner asked about the possibility of meeting the following week, Danuta333 reminded him, "ok, but i am 13, i don't drive." Id., at App. 6a.

During the next two months, the petitioner engaged in twenty-eight instant message chats, and several e-mail communications, with Danuta333. The chats were sexually graphic, and included topics such as swallowing male ejaculate, anal intercourse, shaving pubic hair, and submissive/dominant activities. In the chats, they discussed possible locations for engaging in sexual activity, including a hotel room or the petitioner's van, and they also discussed meeting in a public restaurant. On a few occasions, the petitioner sent pornographic images. Id., at App. 7a.

The petitioner repeatedly insisted on seeing Danuta333's photograph before meeting her in person. After six weeks of chats, Det. Wardwell sent petitioner a computer-generated composite "photograph"of Danuta333, designed to resemble a photograph from a middle school yearbook. The petitioner and Danuta333 eventually made plans to meet on March 8, 2000, at a donut shop in New Britain. Id., at App. 7a.

On the scheduled day, the petitioner drove from Massachusetts to New Britain, but went to the wrong donut shop, and then returned home. After a few more chats, he again drove to New Britain on March 14, 2000. He arrived at the shopping plaza where the donut shop was located and, "upon exiting his vehicle, was arrested by officers of the New Britain police department." Id., at App. 7a-9a. In an oral statement to police after his arrest, he admitted he had come to New Britain

to meet an individual with whom he had been communicating over the Internet. He told the police "that he had intended to tell her that he was just 'goofing,' and to thank her for speaking with him on line." Id., at App. 9a.

A search of the van in which the defendant had driven to New Britain, revealed "a videocassette recorder containing a video entitled '24 Hour Lip Service' that was cued to a scene depicting an adult female performing fellatio on an adult male." Id., at App. 9a. Later that day, a search of the defendant's home computer "revealed evidence of electronic communications between JoeSkotr and Danuta333, the [petitioner]'s receipt of Wardwell's composite images of Danuta333 and the images that the defendant had sent to Danuta333." Id., at App. 9a-10a.

As a result of the Internet communications with Danuta333 and the two trips to New Britain, the petitioner was charged not only with computer-based crimes (attempt to entice a minor and importing child pornography), but with multiple counts of attempted sexual assault and attempted risk of injury to a child. In a twelve count Information, he was charged with:

– two counts of attempt to commit sexual assault in the second degree, in violation of Conn. Gen. Stat. § 53a-49(a)(2) and 53a-71(a)(1);

– two counts of attempt to commit risk of injury to a child by sexual contact, in violation of Conn. Gen. Stat. § 53a-49(a)(2) and § 53-21(2) (Rev. to 1999);

– three counts of attempt to commit risk of injury to a child, in violation of Conn. Gen. Stat. § 53a-49(a)(1) and § 53-21(1) (Rev. to 1999);

– one count of attempt to entice a minor to engage in sexual activity, in violation of Conn. Gen. Stat. § 53a-49(a)(1)

and § 53a-90a(a);

– one count of importing child pornography, in violation of Conn. Gen. Stat. (Rev. to 1999) § 53a-196c;

– one count of obscenity, in violation of Conn. Gen. Stat. § 53a-194(a);

– two counts of attempt to promote a minor in an obscene performance, in violation of Conn. Gen. Stat. §§ 53a-49(a)(2) and 53a-196b(a).

Petitioner's eleven-day jury trial was held in December 2002. At the conclusion of the state's case in chief, the trial court granted a defense motion for acquittal on the two charges of attempt to promote a minor in an obscene performance. The other ten charges remained.

The petitioner did not testify, but he never disputed that he was the one conversing with Danuta333. The defense theory at trial was that petitioner had engaged in sexual fantasy role-playing with Danuta333, and that based on the content of the chats, and her photograph, he reasonably could have believed she was at least sixteen years of age (the age of consent for sexual intercourse in Connecticut, and the demarcation line for "child" pornography and for risk of injury to a "child"). This defense was supported by testimony from a clinical psychologist, Dr. David Greenfield, an expert on the "psychology" of the Internet. He testified that people often engage in sexual role-playing on the Internet, since they feel uninhibited due to its "perceived anonymity." In addition, he testified that people frequently lie and misrepresent themselves on the Internet, and *age* is one of the characteristics about which those lies are often told.

The obscenity charge was based on *all* of the pictorial images and chats sent to Danuta333, while the child

pornography charge was based only on two images of a young female, naked above the waist. A computer technician testified for the defense that once a pictorial image is converted into digital format, as these images were, the digital images can be manipulated, and there is no way to discern if the images are of a "real" person.

On December 23, 2002, the jury convicted the petitioner on all ten charges. On February 5, 2003, he was sentenced to a total effective term of ten years, execution suspended after five years, and fifteen years probation.

The petitioner appealed to the Connecticut Supreme Court, challenging each conviction on various grounds. In an opinion released on Feb. 7, 2006, the Connecticut Supreme Court rejected all of his claims. The petitioner thereafter filed a motion for reargument or reconsideration, that was denied by the court on March 14, 2006.

STATE TRIAL AND APPELLATE PROCEEDINGS

State v. Sorabella marked Connecticut's first venture into the field of attempt liability with "virtual" victims, and with associated questions involving pornographic or obscene images transmitted via the Internet. Although petitioner's case was not factually complex, it gave rise to a constellation of legal issues, the most significant of which are discussed below.

A. The Convictions of Attempt to Commit Sexual Assault in the Second Degree and Attempt to Commit Risk of Injury to a Child

The petitioner challenged his two convictions of attempt to commit sexual assault in the second degree, and five convictions of attempt to commit risk of injury to a child, on these principal grounds: (1) that neither statute constituted a

cognizable offense; (2) that the statutes, as applied, were void for vagueness; and (3) that the evidence was insufficient to support the convictions.

1. The Non-Cognizability Claims

The petitioner's claim that attempt to commit sexual assault in the second degree (Gen. Stat. § 53a-71(a)(1)) is not a cognizable crime, rested on the following line of reasoning:

(1) The statute contains no mental state element, and defenses such as consent, mistake of age, emancipation, and fraudulent misrepresentation, are not available;

(2) The statute is an "age driven" statute; *State v. Plude*, 30 Conn. App. 527, 535, 621 A.2d 1342, cert. denied, 225 Conn. 923, 625 A.2d 824 (1993); and is properly characterized as a "statutory rape" provision; see *State v. Jason B.*, 248 Conn. 543, 553, 729 A.2d 760 (quoting legislators who described Conn. Gen. Stat. § 53a-71 as a "statutory rape" provision), cert. denied, 528 U.S. 967 (1999); *State v. Sorabella*, supra, 168, at App. 11a (§ 53a-71(a)(1) is "sometimes referred to as statutory rape");

(3) "Statutory rape" offenses have traditionally been viewed as strict liability offenses, as "[t]he majority of appellate courts" have held. *Garnett v. State*, 632 A.2d 797, 805 (Md. 1993);

(4) Although Connecticut cases often describe attempt as a "specific intent" crime; see, e.g., *State v. Hinton*, 227 Conn. 301, 316, 630 A.2d 593 (1993); *State v. Henry*, 253 Conn. 354, 362, 752 A.2d 40 (2000); the attempt statute provides that the mental state required for attempt liability is the *same* mental state required for the underlying crime, i.e., to be guilty of an attempted crime, a person must "act[] with the

kind of mental state required for commission of the [underlying] crime"; see *State v. Brown*, 235 Conn. 502, 517, 668 A.2d 1288 (1995) (the intent must be "identical").

(5) Because Connecticut's attempt statute does not expressly impose a specific intent requirement, the Connecticut Supreme Court cannot "amend" or validate a statute's application in a particular case, by engrafting an intent requirement.

In presenting this claim on direct appeal, the petitioner acknowledged that several courts had held that attempt to commit statutory rape *is* a cognizable crime. See, e.g., *State v. Chhom*, 911 P.2d 1014, 1015-17 (Wash. 1996) (en banc); *State v. Sines*, 579 S.E.2d 895 (N.C. Ct. App.), cert. denied, 587 S.E.2d 69 (N.C. 2003); *State v. Brienzo*, 671 N.W.2d 700, 706-07 (Wis. Ct. App.), review denied, 673 N.W.2d 691 (Wis. 2003).

In September 2005–after the date of oral argument in this case (March 14, 2005), but prior to release of the Connecticut Supreme Court's opinion–the petitioner notified the court of a decision released by the Court of Appeals of Maryland on September 7, 2005. In that decision, *Moore v. State*, 388 Md.. 623, 882 A.2d 256 (2005), the Court of Appeals held, in a case with similar elements arising from an Internet sting, that "there is *no such crime of attempted third degree sexual offense* under the present statutory scheme and common law principles." (Emphasis added.) Id., 269.[1]

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[1] The *Moore* court concluded that since the crime of third degree sexual offense was a strict liability offense, with "no intent element or *mens rea* element with regard to the 'victim's' age, it follows that, absent a change in the statute, there can be no crime of attempt such as charged in the present indictment." Id., 268-69. See also *Maxwell v. State*, 895 A.2d 327 (Md. App. 2006) (discussing *Moore*).

The Connecticut Supreme Court rejected the petitioner's claim on the ground that "the offense of sexual assault in the second degree is not a strict liability crime; rather, it is a *general intent* crime." (Emphasis added.) *State v. Sorabella*, supra, 170, at App. 12a. As the court observed, "[t]he fact that the state is not required to establish that the accused knew that his victim was under sixteen years of age does not transform the offense into a strict liability offense because the state still must establish that the accused had the *general intent* to have sexual intercourse with the victim." (Emphasis added.) Id., 170, at App. 12a-13a. However, the Court supported its conclusion by *adding* a mental state requirement that does not appear in the sexual assault statute or in the main proviso of the attempt statute, i.e., that the petitioner *knew* or *believed* that Daunta333 was thirteen years old:

– "In the circumstances of this case, however, in which the victim, Danuta333, was not a real person, the state was required to prove that the defendant believed that Danuta333 was thirteen years of age because, in the absence of such proof, the state could not establish a crime at all. In other words, for purposes of this case, which arises out of an Internet sting operation, because there was no *actual* person under the age of sixteen with whom the defendant was attempting to have sexual intercourse, the state necessarily had to prove that the defendant *believed* that there was a person under that age with whom he was going to engage in sexual intercourse." (Emphases in original.) Id., 170, at App. 13a;

– "the state understandably, and properly, assumed that burden [of proving that the petitioner knew that the victim was less than sixteen years of age] in this Internet sting case . . . ."; Id.,172 n. 20, at App. 14a;

– "We note that, in the circumstances of this case,

which arises out of an Internet sting operation that did not involve a real underage victim, the state necessarily undertook the burden of establishing that the defendant *believed* that the victim was under sixteen years of age.") (Emphasis added.); Id., 172 n. 21, at App. 15a;

– "As we have explained, the state alleged that the defendant had *knowledge* of Danuta333's age and, because of the nature of the Internet sting operation that gave rise to the charges against the defendant, necessarily assumed the burden of proving the defendant's *knowledge* in that regard." (Emphasis added.) Id., 178 n. 28, at App. 21a.

The petitioner made similar claims of non-cognizability with respect to the offenses of attempt to commit risk of injury to a child, under Conn. Gen. Stat. § 53-21 (1) and 21(2). Noting that the crime of risk of injury to a child is a general intent crime, the court rejected the petitioner's claim "[f]or the same reasons" that it rejected the claim that sexual assault in the second degree was not a cognizable crime. *State v. Sorabella*, supra, 172-74, at App. 14a-17a. In short, the court held that "the state is free to charge an attempt to commit a general intent crime" such as sexual assault in the second degree, or risk of injury to a child. Id., 174, at App. 17a.

2. The Vagueness and *Bouie* Claims

The petitioner claimed that the statutes defining the crimes of attempt to commit sexual assault in the second degree and attempt to commit risk of injury to a child, as applied, were void for vagueness. The petitioner argued, inter alia, that where, as here, "age . . . is the crucial element separating legal innocence from wrongful conduct"; *United States v. X-Citement Video*, Inc., 513 U.S. 64, 73 (1994); federal and state due process demanded more notice than was provided in this case.

The Connecticut Supreme Court rejected the vagueness claim, holding that the petitioner was not deprived of fair notice regarding the effect of the statutes, and that the statutes did not permit arbitrary or discriminatory law enforcement. Id., 191-95, at App. 34a-38a.

In his motion for reargument, the petitioner asserted that if the language of the statutes was not vague, the petitioner had been subjected to the "much greater" due process violation that occurs when the deprivation of fair notice results from an appellate court's construction of the statute: "There can be no doubt that a deprivation of the right of fair warning can result not only from vague statutory language but also from an unforeseeable and retroactive judicial expansion of narrow and precise statutory language." *Bouie v. City of Columbia*, 378 U.S. 347, 352 (1964); *Bradshaw v. Richey*, 546 U.S.__,126 S.Ct. 602, 604 (2005) (quoting same); *Rogers v. Tennessee*, 532 U.S. 451, 457-62 (2001) (discussing *Bouie*). In the context of this case, the principles of *Bouie* should have prevented the Connecticut Supreme Court from effectively "creating" a crime–or sanctioning its creation because of the state's willingness to "assume" additional burdens of proof in the case. See *State v. Sorabella*, supra, 170-71, n. 19, at App.13a ("the state expressly assumed the burden of establishing that the defendant knew that the victim was thirteen years of age . . . the state assumed that burden in this case"); id., 172 n. 20 ("the state understandably, and properly, assumed that burden" of proving that the defendant "knew that the victim was under sixteen years of age"); id., 172 n. 21, at App. 15a ("the state necessarily undertook the burden of establishing that the defendant believed that the victim was under sixteen years of age"); id., 178 n. 28, at App. 21a ("As we have explained, the state alleged that the defendant had knowledge of Danuta333's age and, because of the nature of the Internet sting operation that gave rise to the charges against the defendant, necessarily assumed the burden of proving the defendant's knowledge in

that regard.").

The issue in this case was whether a cognizable crime *existed* at the time of the petitioner's conduct, not whether the state could later "fill in the blanks" and construct a statutory offense by being magnanimous in its charging document. See *Moore v. State*, supra, 270 (rejecting state's theory that would have inserted a *mens rea* element with respect to the defendant's "belief as to [the victim's] age," because "[s]uch *mens rea* is *not* part of the statute.") (Emphasis added.).

3. The "Substantial Step" Claims

The petitioner claimed that the evidence was insufficient to prove his guilt of attempt to commit sexual assault in the second degree and attempt to commit risk of injury to a child. The petitioner's claim was based, in part, on the claim that there was insufficient evidence to prove the "substantial step" element of attempt liability, to wit, that the petitioner engaged in an act or omission which constituted "a substantial step in a course of conduct planned to culminate in his commission of the crime." The petitioner argued that driving to the prearranged location to meet Danuta333 in a public place constituted planning or preparation, but not a "substantial step."

The Connecticut Supreme Court disagreed, noting that "[a] decided majority of the courts that have considered the issue . . . have concluded that the conduct of a suspect who, for the purpose ultimately of having sex with a person whom the suspect believes to be a child, travels to a prearranged location to meet that child, is sufficient to constitute a substantial step in furtherance of the planned sex crime." *State v. Sorabella*, supra, 182, at App. 25a-26a (citing decisions from Arkansas, Georgia, Idaho, Illinois, Missouri, Wisconsin, and from the Fifth, Ninth, and Eleventh Circuit Courts of Appeals). The

court declined to adopt the minority position, "embraced by two states [Florida and Indiana], that such acts are not sufficient to prove the defendant's attempt to commit the sex crime." [2] Id., 182-83, at App. 26a.

B. The Conviction of Importing Child Pornography

The charge of importing child pornography was based on two digital photographic images that were embedded in e-mails which petitioner sent to Danuta333. The evidence revealed that the images were sent by e-mail *to* the petitioner at about 1:00 a.m on Feb. 11, 2000, and the petitioner "forwarded" them to Danuta333 on the afternoon of Feb.12, 2000, during the course of an instant message conversation. The two images (St. Ex. 22 and 23) appear to depict the same female, "wearing only panties," and with her naked breasts visible.[3] *State v. Sorabella*, supra, 184-86, at App. 27a-30a.

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[2] In *State v. Duke*, 709 So.2d 580, 581-82 (Fla. Dist. Ct. App. 1998), the court held that traveling to a prearranged destination to meet a fictitious 12-year-old girl, did not reach "the level of an overt act leading to the commission of sexual battery as required by [the statute]," and was therefore "not enough to constitute an attempt to commit a sexual battery." Id. And in *State v. Kemp*, 753 N.E.2d 47, 48-51 (Ind. Ct. App. 2001), transfer denied, 783 N.E.2d 693 (Ind. 2002), it was held that a defendant's conduct in traveling to meet a fictitious 14-year-old "in a restaurant parking lot near a motel," did "not reach the level of an overt act leading to the commission of child molesting." Id., 51. "At most, such allegations only reach the level of preparing or planning to commit an offense. Were we to conclude otherwise, there would be no limit on the reach of 'attempt' crimes." Id.

[3] At the time of petitioner's conduct, "child pornography" was defined as "any material involving a live performance or photographic or other visual reproduction of a live performance which depicts a minor in a prohibited sexual act." Conn. Gen. Stat. (Rev. to 1999) § 53a-193(13). A "prohibited sexual act" was defined to include a "nude performance," and a "nude performance" was defined to include "the showing of the female breast with

Just before sending the first image, the petitioner stated, "I have [a picture] of a 13 year old that I do know....." After sending the first image, Danuta333 made some comments about the female's appearance, and within a few minutes, the petitioner sent the second image. The petitioner then stated, "She's also from CT," and when Danuta333 asked him if he had taken the pictures, he answered "No." When Danuta333 subsequently asked, "how do ya know she's 13?," the petitioner replied, "She said so." He thereafter stated, "She's from the Hartford area.... Not too far from you...." *State v. Sorabella*, supra, 184-85 and n. 34, at App. 28a-29a. When Danuta333 asked the petitioner if he "*met her on line*?," the petitioner responded "Yes." (Emphasis added.) There was *no* evidence that petitioner had ever seen or met, in person, the individual depicted in the images (assuming that she *was* a real person).

The court instructed the jury that the two images were "the only exhibits" they could consider for the child pornography charge. The jurors were instructed that the state had the burdens of proving that the female depicted in the images was "an actual real person,"rather than a "virtual or computer generated image," and that she was "under the age of 16." See *State v. Sorabella*, supra, 186 n. 35, at App. 29a (noting that jury was instructed, in conformity with *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002), that the images had to be of an actual person under the age of sixteen).

On appeal, the petitioner challenged his conviction on the grounds, inter alia, that the evidence was insufficient to prove the elements of "reality" and "minority." Because petitioner had not taken the pictures, and since there was no evidence he ever met the person, he argued that his own

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less than a fully opaque covering of any portion thereof below the top of the nipple . . . ." Conn. Gen. Stat. (Rev. to 1999) § 53a-193(3) and (4).

statements (imparting information he acquired from an on line conversation) could not establish that the "she" in the images was real. Petitioner also claimed that the reasonable doubt standard required something more, such as expert testimony, to prove that an unidentified person is real.

As for the age element, petitioner contended that the reasonable doubt standard required more than "just the picture" and his statement, "she said so." As petitioner pointed out, for purposes of importing child pornography, his "belief" as to the person's age was irrelevant–what had to be proved was the *fact* that she was under sixteen years of age.

The Connecticut Supreme Court resolved the issue by holding that petitioner had "verified" her age and reality:

> Contrary to the [petitioner]'s claims that the evidence failed to establish that the photographs were not real and that the person depicted in the images was under the age of sixteen, the [petitioner] personally verified both the authenticity of the photographs and the age of the female appearing in those photographs. The jury also viewed the images, each of which depicts the same young girl. The images are clear and readily discernible. That viewing, coupled with the [petitioner]'s representations, was sufficient to permit a jury to find that the photographs depicted a real, thirteen year old girl, naked from the waist up.

State v. Sorabella, supra, 186, at App. 30a. The opinion notes that the members of the Connecticut Supreme Court "also have viewed the photographs, which appear to depict a young female under the age of sixteen." Id., 186 and n. 36, at App. 30a.

With respect to the claim that expert testimony should have been required to prove reality and age, the Connecticut

Supreme Court "agree[d] that, at least in some cases, it may be difficult for a lay observer to distinguish between real and virtual images." Id., 187, at App. 31a. However, in light of the "absence of any persuasive support for the view advocated by the [petitioner]," the court declined "to adopt a special rule of evidence for cases such as the present case, which involves images transmitted over the Internet." Id., 188, at App. 31a-32a. The court reiterated its belief that "'[j]uries are still capable of distinguishing between real and virtual images . . . .'" Id., 188, at App. 32a (quoting *United States v. Kimler*, 335 F.3d 1132, 1142 (10th Cir.), cert. denied, 540 U.S. 1083 (2003)).

C. The Conviction of Attempt to Entice A Minor

The petitioner was charged with attempt to entice a minor. The substantive offense is defined as follows: "[a] person is guilty of enticing a minor when such person uses an interactive computer service to *knowingly* persuade, induce, entice or coerce any person under sixteen years of age to engage in prostitution or sexual activity for which the actor may be charged with a criminal offense." (Emphasis added.) Conn. Gen. Stat. § 53a-90a.

In its charging document accusing petitioner of attempt to commit this offense, the state alleged that he "us[ed] an interactive computer service to persuade and entice a person he *believed* to be a 13 year old female to engage in sexual activity." (Emphasis added.)

On appeal, the petitioner claimed that the evidence was insufficient to prove that he "knew" he was communicating with a person under the age of sixteen. He asserted that the word "knowingly" must be "presumed to apply to every element of the offense"; Conn. Gen. Stat. § 53a-5; and he quoted from a legislative debate where it was stated that

"knowingly" means that a person must "really know that you're dealing with a child under the age of 16."

Although petitioner's claim was squarely focused on the element of "knowingly," the Connecticut Supreme Court restated the claim as being that "the state failed to prove that he *believed* that he was communicating with a person under the age of sixteen." (Emphasis added.) *State v. Sorabella*, supra, 190-91, at App. 34a. "Knowing" and "believing" are not the same; the former signifies a higher mental state than the latter. "Although a person may subjectively *believe*, as [defendant] did, something that is not true, it is entirely different to have *knowledge* or a reason to know a fact." *Mejak v. Granville*, 2006 Ariz. LEXIS 62 (Ariz. May 24, 2006) (reversing "luring" conviction). "Knowingly" is the *only* mental state that appears in the enticement statute, and "[a] person acts 'knowingly' with respect to conduct *or to a circumstance described by a statute* defining an offense when he is *aware* that his conduct is of such nature or *that such circumstance exists*." (Emphasis added.) Conn. Gen. Stat. § 53a-3(12). Thus, the Connecticut Supreme Court upheld an *attempt* conviction upon proof of a *less* culpable mental state than would be required for the substantive offense.

D. The Obscenity Conviction

1. Trial Court Proceedings

The petitioner was charged with a single count of obscenity, which alleged that "on or about divers dates between January and February 2000, in the City of New Britain, [petitioner] did disseminate obscene material, and the [petitioner] had knowledge of the content and character of such material . . . ." Prior to trial, petitioner did not seek, through a bill of particulars, or otherwise, a specification of the particular

items alleged to be obscene.

At a conference held prior to the jury charge, petitioner's trial counsel requested a "unanimity" instruction on the obscenity charge. In response to the request, the trial court asked defense counsel: "Your view is that all six jurors have to agree that, on at least one image or video as having been obscene before the accused can be convicted. Right? And they need to be told that?" Defense counsel said, "[p]recisely." Counsel claimed that a *general* unanimity instruction would not be sufficient. The prosecutor argued it was not necessary for jurors unanimously to agree on the obscene nature of "any specific item."

The court declined the defense request for a specific unanimity instruction on obscenity, but did give a general instruction that the *verdict* on each count had to be unanimous. In rejecting the defense request, the court observed that for purposes of the obscenity statute, "what's important is the cumulative effect and the dominant theme of the material considered as a whole."

In its instructions on obscenity, the court told the jury to consider all of the still and moving images sent to Danuta333 (including the two images alleged to constitute child pornography), as well as the "content of the chats themselves." That instruction permitted the jury to consider about three dozen items (images and text) in deciding the obscenity charge. (The transcripts of the chats and e-mails cover more than one hundred pages of dialogue.).

2. The Unanimity Claim on Appeal

On appeal, petitioner claimed that his federal rights to due process of law, and to a valid jury verdict, were violated by the court's failure to give a specific unanimity instruction on

obscenity. The Connecticut Supreme Court rejected the claim, finding that the trial court "did not give an instruction expressly sanctioning a nonunanimous verdict on the charge of obscenity," and that the state "sought to establish that those [allegedly obscene] materials, *considered collectively*, were sufficient to establish a violation of" the obscenity statute. (Emphasis added.) *State v. Sorabella*, supra, 207, at App.51a. The court observed that "it is clear that each and every juror found, at the very least, that the materials introduced into evidence, *considered together*, were obscene." (Emphasis added.) Id., 208, at App. 52a.

The petitioner also claimed that he was effectively precluded from challenging the sufficiency of the evidence, because he could not ascertain the factual basis for the obscenity conviction. The court described the claim as an "unsubstantiated" claim of evidentiary insufficiency with respect to that charge." Id., 208 n.51, at App. 52a.

In a motion for reargument, petitioner contended that the trial court's error prevented the Connecticut Supreme Court from discharging *its* constitutional responsibility independently to review the jury's finding of obscenity. See *Miller v. California*, 413 U.S. 15 , 25 (1973). See also *State v. Andrews*, 150 Conn. 92, 100-101, 186 A.2d 541 (1962) (acknowledging its responsibility to make a "'constitutional judgment'" when reviewing an obscenity conviction).

REASONS FOR GRANTING THE WRIT

Our culture deplores child molesters.

And with good reason. But society's scorn for those who solicit sex from persons under the age of consent–and the criminal justice system's desire to protect children from

potential predators–cannot be allowed to dilute the basic constitutional standards and legal principles that protect us all.

"The Internet and computers have come to play a growing role in sex crimes that are committed against children and youth. Since the mid-1990s these developing technologies have posed challenges for law enforcement requiring them to *confront situations not anticipated in criminal statutes . . . .*" (Emphasis added.) *Internet Sex Crimes Against Minors: The Response of Law Enforcement* (National Center for Missing & Exploited Children, U.S. Dept. of Justice) (Nov. 2003), p. vii. But it is not only law enforcement that has had to adapt. Courts, too, face new challenges in applying "bricks and mortar" criminal statutes to cyberspace communications with non-existent persons.

"The Internet sting cases have generated an impressive number of arrests and convictions," and "Internet sting operations to catch adults preying on children have grown as exponentially as the public's use of the internet." A. Rogers, *New Technologies, Old Defenses: Internet Sting Operations and Attempt Liability*, 38 U. Rich. L. Rev. 477, 502 (Jan. 2004). The increased (and increasing) dependence on sting operations makes the questions presented in this case especially timely. See *United States v. Tykarsky*, _ F.3d _ (3rd Cir. 2006), 2006 U.S. App. LEXIS 11622 9 (May 10, 2006), slip op., at 24 ("It is common knowledge that law enforcement officials rely heavily on decoys and sting operations in enforcing solicitation and child predation crimes. . . ."). Furthermore, sting operations are no longer the sole domain of federal, state, or local law enforcement agencies. Private citizens and "watchdog" groups like Perverted-Justice.com, now conduct their own sting operations, sometimes in conjunction with police or media organizations. Recently, NBC-TV broadcast several sting operations on *Dateline NBC* ("To Catch a

Predator"), and received high Nielsen ratings.[4]

One man's entertainment is another man's prison sentence. This Court should grant certiorari to help insure that those prison sentences are the result of principled and reasoned application of our criminal laws.

1. With respect to the first question presented, certiorari is warranted because two state supreme courts reached opposite conclusions on the question of whether, in the context of a sting operation, attempted statutory rape is a crime. Cf., *State v. Sorabella*, supra (yes), *with Moore v. State*, supra (no). It is not surprising that courts may differ on questions involving the scope of attempt liability, because the subject of criminal attempt "'is more intricate and difficult of comprehension than any other branch of the criminal law.'" T. Arnold, "Criminal Attempts–The Rise and Fall of an Abstraction," 40 Yale L. J. 53 (1931-32) (quoting *Hicks v. Commonwealth*, 86 Va. 223, 226, 9 S.E. 1024, 1025 (Va. 1889)).

Certiorari also is warranted on this question because the Connecticut Supreme Court's conclusions are inconsistent with this Court's pronouncements on the vagueness doctrine, and the principles of *Bouie v. City of Columbia*, supra. Finally, certiorari should be granted because, as noted in § A.3., supra, courts have taken conflicting positions on whether the act of traveling to a public meeting place can satisfy the "substantial step" element of attempt liability.

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[4] According to the Fort Myers *News-Press*, a *Dateline* sex sting in Fort Meyers, Florida, "has been must-see television for Southwest Florida viewers." G. Boxleitner, "*More sex-predator suspects get stung tonight on 'Dateline.'*" news-press.com (originally posted on May 17, 2006). The *Dateline* special "was the highest-rated show for its time period in Southwest Florida, even besting Fox's 'American Idol'. . . ." Id.

2. With respect to the second question presented, involving the crime of importing child pornography, certiorari should be granted to decide if the constitutional standard of proof beyond a reasonable doubt; *In re Winship*, 397 U.S. 358 (1970); requires, at least in a case like this, some additional, *reliable* evidence, beyond the images themselves, to prove the essential elements of *reality* and *minority*. Of course, they are separate questions. See, e.g., *United States v. Hilton*, 386 F.3d 13, 18-19 (1st Cir. 2004) (testimony of government's expert "that the images represented children rather than adults," was insufficient to prove that the children were *real*).

"The technology of the Internet evolves at a rapid pace." *Ashcroft v. American Civil Liberties Union*, 542 U.S. 656, 671 (2004). Five years ago, a report acknowledged that "[n]ew computer technology allows for manipulation (or 'morphing') of real photographs, as well as creation of 'virtual child pornography' through digital images in which no human being is the subject. With the help of relatively inexpensive graphics software, child pornographers can now . . . wholly create a pornographic image of a 'virtual' child who does not actually exist." Klain, Davies, and Hicks, *Child Pornography: The Criminal-Justice-System Response* (ABA Center on Children and the Law for the National Center for Missing & Exploited Children) (March 2001), p. 1-2.

As for proof of reality, "at this time, it appears that no [federal] circuit requires that expert evidence be introduced to prove the reality of children portrayed in pornographic images." *United States v. Farrelly*, 389 F.3d 649 and n. 4 (6th Cir. 2004). See *United States v. Irving*, 432 F.3d 401, 411-12 (2nd Cir. 2005) (rejecting claim that *Free Speech Coalition* "created a bright-line rule requiring the government to present evidence, other than the unlawful images themselves, to prove beyond a reasonable doubt that the pictures were created using real children"); *United States v. Cendejas*, 62 M.J. 334, 338

(C.A.A.F. 2006) ("every federal circuit to have considered the question has held that the factfinder can make a determination that an actual child was used to produce the images in question based upon a review of the images alone").

State courts, too, have held that the image alone can be relied upon to establish that it depicts a real person. See, e.g, *People v. Phillips*, 215 Ill. 2d 554, 571-75, 831 N.E.2d 574 (2005) ("trier of fact in this case could distinguish real from virtual pictures beyond a reasonable doubt simply by viewing the pictures"). But see, *State v. Butler*, 2005 Tenn. Crim. App. LEXIS 302 (Tenn. Crim. App.) ("there will certainly be some cases in which it will not be such a simple matter for the jury to determine if the material contains an actual minor"), app. denied, 2005 Tenn. LEXIS 687 (Tenn. 2005); *People v. Phillips*, 805 N.E.2d 667, 677 (Ill. App. 2004) (Slater, J., concurring and dissenting) ("I believe that technology has rendered 'everyday observations and common experience' of little value in distinguishing between real and virtual images. If proof 'beyond a reasonable doubt' is to retain its meaning, some additional evidence must be required."), aff'd, *People v. Phillips*, supra.[5]

Although there is currently no precedent directly supporting the petitioner's claim, the constitutionally-required standard of proof beyond a reasonable doubt, should be precedent enough. Moreover, "'[t]here is no precedent for

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[5] In his opening brief to the Connecticut Supreme Court, the petitioner relied on *United States v. Hilton*, 363 F.3d 58, 64 (1st Cir. 2004), which held "that the government must introduce relevant evidence *in addition to* the images to prove the children are real." (Emphasis in original.) Subsequently, the First Circuit withdrew that opinion, and issued a new opinion, *United States v. Hilton*, 386 F.3d 13 (1st Cir. 2004), which did not contain the quoted language. See *State v. Sorabella*, supra, 188 n. 38 (discussing *Hilton*), at App. 31a-32a.

anything until it is done for the first time.'" A.P. Herbert, *Uncommon Law* (Doubleday, Doran & Co., Inc. 1936), p. 64 n.1 (quoting a fictional jurist).

Courts have shown somewhat greater concern about proof of age, at least in those situations where the age of the person depicted may be close to the line. Some courts take the position that "[t]he threshold question–whether the age of a model in a child pornography prosecution can be determined by a lay jury without the assistance of expert testimony–must be determined on a case by case basis." *United States v. Katz*, 178 F.3d 368, 373 (5th Cir. 1999) (affirming pretrial order excluding computer photos from evidence, and noting that "in this case, in which the government must prove that a model, who is post-puberty but appears quite young, is less than eighteen years old, expert testimony may well be necessary"); *United States v. Riccardi*, 405 F.3d 852, 870 (10th Cir.) (whether expert testimony required is a "judgment" that "must be met on a case-by-case basis"), cert. denied, __ U.S., 126 S.Ct. 299 (2005); *Abernathy v. State*, 278 Ga. App. 574, 2006 Ga. App. LEXIS 380 (March 30, 2006) (case by case approach; reversing convictions where pictures alone were not sufficient to prove that individuals were under eighteen); *State v. May*, 362 N.J. Super. 572, 593-95, 829 A.2d 1106, 1119-20 (N.J. App. Div. 2003) (case by case approach, but noting that "proof of a person's age by his or appearance alone is a questionable practice," and that "when the persons depicted in the images approach sixteen years of age, 'expert testimony may well be necessary . . . .'").

3. Certiorari should be granted on the third question presented, involving the conviction of attempt to entice a minor, because it is analogous to a federal issue that has provoked disagreement. In *United States v. Helder*, 2005 U.S. Dist. LEXIS 38874 (W.D.Mo. 2005) (Whipple, J.), appeal docketed, No. 05-3387 (8th Cir. Sept. 1, 2005), the District

Court acquitted the defendant of violating a federal "enticing" statute, 18 U.S.C. § 2422(b), on the grounds that the defendant's "belief" that he was communicating with a minor, was insufficient to prove an *attempt* under the statute. "Nowhere in the [federal] statute does the word 'belief' appear," id., and of course, the same can be said of the Connecticut statute. Judge Whipple subsequently applied similar reasoning to invalidate a federal indictment (charging violations of 18 U.S.C. § 2422(b) and § 2423(b)) in *United States v. Hicks*, 2005 U.S. Dist. LEXIS 36625 (W.D. Mo. 2005) (Whipple, J.) (explaining his disagreement with three federal Circuits that have reached contrary conclusions).

4. Certiorari also should be granted on the final question presented, relating to the obscenity charge. If the trial court had granted the request for a unanimity instruction, and the jury had then returned a guilty verdict, trial defense counsel would have moved to have the jury specify or mark the particular exhibit(s) found to be obscene. But without the unanimity instruction, there was no way of knowing if, for example, each of the six jurors found a different image to be obscene. For a constitutionally-valid jury verdict on a charge of obscenity, the constitution surely requires "six of one," not "half a dozen of the other*s*."

The downstream consequences of the asserted error, is that the Connecticut Supreme Court was not able to make an independent judgment on the issue of obscenity, as required by this Court's precedents. See *Miller v. California*, supra, 25 ("the First Amendment values applicable to the States through the Fourteenth Amendment are adequately protected by the ultimate power of appellate courts to conduct an independent review of constitutional claims when necessary"); *Jenkins v. Georgia*, 418 U.S. 153, 159-60 (1974) (quoting same); *Ward v. Illinois*, 431 U.S. 767, 769 (1977) (same). The net result is that *nobody* knows–not the petitioner, not the prosecutor, not the

review of constitutional claims when necessary"); *Jenkins v. Georgia*, 418 U.S. 153, 159-60 (1974) (quoting same); *Ward v. Illinois*, 431 U.S. 767, 769 (1977) (same). The net result is that *nobody* knows–not the petitioner, not the prosecutor, not the trial court, not the Connecticut Supreme Court–what passage, or picture, constituted the basis for the obscenity conviction. See *People v. Grasberg*, 215 N.Y.S.2d 1, 2-3 (A.D. 1st Dept. 1961) (reversing conviction where prosecution introduced between five hundred and one thousand pictures, but neither prosecutor nor trial court identified the particular pictures claimed, or found, to be obscene); *People v. Zucker*, 225 N.Y.S.2d 154, 155 (A.D. 1st Dept. 1962) (reversing obscenity conviction where state introduced thirty-eight photographs and eighteen books, but prosecutor never pointed out the particular items claimed to be obscene, and trial court "did not as a basis for its finding identify the photograph, photographs or books found by it to be obscene").

CONCLUSION

For all of the foregoing reasons, a writ of certiorari should issue to review the judgment and opinion of the Connecticut Supreme Court.

Respectfully Submitted,
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APPENDIX

APPENDIX A

CONNECTICUT SUPREME COURT

STATE OF CONNECTICUT *v.* JOHN SORABELLA III
(SC 17215)

Sullivan, C. J., and Borden, Katz, Palmer and Zarella, Js.

Argued March 14, 2005 – officially released February 7, 2006

Opinion

PALMER, J. A jury found the defendant, John Sorabella III, guilty of two counts of attempt to commit sexual assault in the second degree in violation of General Statutes §§ 53a-71 (a) (1)[1] and 53a-49 (a) (2),[2] two counts of attempt to commit risk

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[1] General Statutes § 53a-71 (a) provides in relevant part: "A person is guilty of sexual assault in the second degree when such person engages in sexual intercourse with another person and: (1) Such other person is thirteen years of age or older but under sixteen years of age and the actor is more than two years older than such person . . . ."

Sexual intercourse is defined as "vaginal intercourse, anal intercourse, fellatio or cunnilingus between two persons regardless of sex." General Statutes § 53a-65 (2).

[2] General Statutes § 53a-49 provides in relevant part: "(a) A person is guilty of an attempt to commit a crime if, acting with the kind of mental state required for commission of the crime, he . . . (2) intentionally does or omits to do anything which, under the circumstances as he believes them to be, is an act or omission constituting a substantial step in a course of conduct planned to culminate in his commission of the crime.

"(b) Conduct shall not be held to constitute a substantial step under subdivision (2) of subsection (a) of this section unless it is strongly corroborative of the actor's criminal purpose. Without negating the sufficiency of other conduct, the following, if strongly corroborative of the actor's criminal purpose, shall not be held insufficient as a matter of law: (1) Lying in wait, searching for or following the contemplated victim of the

of injury to a child by sexual contact in violation of General Statutes (Rev. to 1999) § 53-21 (2)[3] and § 53a-49 (a) (2), three counts of attempt to commit risk of injury to a child in violation of General Statutes (Rev. to 1999) § 53-21 (1)[4] and § 53a-49 (a) (1),[5] one count of attempt to entice a minor to engage in sexual

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crime; (2) enticing or seeking to entice the contemplated victim of the crime to go to the place contemplated for its commission; (3) reconnoitering the place contemplated for the commission of the crime; (4) unlawful entry of a structure, vehicle or enclosure in which it is contemplated that the crime will be committed; (5) possession of materials to be employed in the commission of the crime, which are specially designed for such unlawful use or which can serve no lawful purpose of the actor under the circumstances; (6) possession, collection or fabrication of materials to be employed in the commission of the crime, at or near the place contemplated for its commission, where such possession, collection or fabrication serves no lawful purpose of the actor under the circumstances; (7) soliciting an innocent agent to engage in conduct constituting an element of the crime. . . ."

[3] General Statutes (Rev. to 1999) § 53-21 provides in relevant part: "Any person who . . . (2) has contact with the intimate parts, as defined in section 53a-65, of a child under the age of sixteen years or subjects a child under sixteen years of age to contact with the intimate parts of such person, in a sexual and indecent manner likely to impair the health or morals of such child . . . shall be guilty of a class C felony."

[4] General Statutes (Rev. to 1999) § 53-21 provides in relevant part: "Any person who (1) wilfully or unlawfully causes or permits any child under the age of sixteen years to be placed in such a situation that the life or limb of such child is endangered, the health of such child is likely to be injured or the morals of such child are likely to be impaired, or does any act likely to impair the health or morals of any such child . . . shall be guilty of a class C felony."

Hereinafter, all references to § 53-21 are to the 1999 revision.

[5] General Statutes § 53a-49 (a) provides in relevant part: "A person is guilty of an attempt to commit a crime if, acting with the kind of mental state required for commission of the crime, he: (1) Intentionally engages in conduct which would constitute the crime if attendant circumstances were as he believes them to be . . . ."

activity in violation of General Statutes §§ 53a-90a (a)[6] and 53a-49 (a) (1), one count of importing child pornography in violation of General Statutes (Rev. to 1999) § 53a-196c[7] and one count of obscenity in violation of General Statutes § 53a-194 (a).[8] The trial court rendered judgments in accordance with the jury verdicts and sentenced the defendant to a total effective term of ten years imprisonment, execution suspended after five years, and fifteen years probation. On appeal,[9] the defendant claims that: (1) he was improperly convicted of attempt to commit sexual assault in the second degree and attempt to commit risk of injury to a child because neither of those

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[6] General Statutes § 53a-90a (a) provides: "A person is guilty of enticing a minor when such person uses an interactive computer service to knowingly persuade, induce, entice or coerce any person under sixteen years of age to engage in prostitution or sexual activity for which the actor may be charged with a criminal offense. For purposes of this section, 'interactive computer service' means any information service, system or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet and such systems operated or services offered by libraries or educational institutions."

[7] General Statutes (Rev. to 1999) § 53a-196c provides in relevant part: "(a) A person is guilty of importing child pornography when, with intent to promote child pornography, he knowingly imports or causes to be imported into the state any child pornography of known content and character.

"(b) Importation of two or more copies of any publication containing child pornography shall be prima evidence that such publications were imported with intent to promote child pornography. . . ."

[8] General Statutes § 53a-194 (a) provides: "A person is guilty of obscenity when, knowing its content and character, he promotes, or possesses with intent to promote, any obscene material or performance."

[9] The defendant appealed to the Appellate Court, and we transferred the appeal to this court pursuant to General Statutes § 51-199 (c) and Practice Book § 65-1.

charges represents a cognizable crime; (2) even if attempt to commit sexual assault in the second degree and attempt to commit risk of injury to a child are cognizable crimes, the evidence adduced by the state was insufficient to support the jury's finding of guilty with respect to those offenses, as well as the offenses of importing child pornography and attempt to entice a minor; (3) the statutes defining the crimes of attempt to commit sexual assault in the second degree and attempt to commit risk of injury to a child are void for vagueness; (4) the trial court improperly instructed the jury on the crimes of attempt to commit sexual assault in the second degree, attempt to commit risk of injury to a child, importing child pornography, and obscenity; (5) the crime of importing child pornography is applicable only to the commercial importation of child pornography and not to the defendant's conduct in the present case; and (6) the trial court improperly permitted the state to adduce expert testimony regarding the characteristics of a certain category of sex offenders. We reject the defendant's claims and, accordingly, affirm the judgments of the trial court.

The jury reasonably could have found the following facts. In January, 2000, the New Britain police department initiated an undercover investigation into possible criminal violations of state child pornography laws over the Internet. In particular, on January 4, 2000, Detective James Wardwell assumed the persona of a thirteen year old girl and, using the screen name "Danuta333," entered an America Online (AOL) chat room entitled, "I Love Much Older Men."[10] The AOL profile that

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[10] A screen name is the mode of identification by which an AOL member identifies himself or herself online. AOL provides its members with the opportunity to create and to publish a profile, listed under the member's screen name, which may include various items of personal information about the member, such as the member's real name, birth date and address or location. Published profiles are available to all AOL members. Chat rooms are electronic "rooms" in which participants may communicate in real time

Wardwell had created identified Danuta333 as a thirteen year old female from Connecticut. After staying in the chat room for less than one minute, Wardwell exited the chat room without initiating contact with any other AOL user. Less than one minute after exiting the chat room, however, Wardwell received an instant message[11] from an individual, subsequently identified as the defendant, using the screen name "JoeSkotr."[12] The following exchange occurred:

"JoeSkotr: Hello

"Danuta333: hi there

"JoeSkotr: From CT?

"Danuta333: yeah, u?

"JoeSkotr: 42 male from Mass

"Danuta333: that's close to me, kind of

"JoeSkotr: My age an issue?

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by typing messages and sending them back and forth to each other. Upon entering a chat room, a member's screen name is visible to others in the room. If that screen name is the subject of a published profile, the profile also is accessible. AOL members can locate and access chat rooms using an AOL directory.

[11] Instant messaging is a means of communicating in real time over the Internet if both participants simultaneously are connected to AOL. When one member types a message and pushes send, the communication travels instantaneously to an AOL server in Virginia and then to the recipient member's computer. AOL does not store or save instant messages, but a member may save such messages on his or her personal computer.

[12] At Wardwell's request, AOL provided him with documentation from its database confirming that "JoeSkotr" was the screen name used by the defendant of Watertown, Massachusetts. The defendant has never disputed that he was the person communicating with Danuta333 under the screen name JoeSkotr.

"Danuta333: is mine??????????

"JoeSkotr: No"

Thereafter, the defendant asked Danuta333 if she had ever "[b]een with someone [his] age," and whether she had a photograph that she could send him. The defendant also asked, "[h]ow old are you again?" Danuta333 replied, "13." The defendant then inquired extensively about Danuta333's prior sexual experience. When Danuta333 asked "why all the questions???" the defendant replied, "I wanted to see if you had the experience I want . . . ." During this first interaction, the defendant and Danuta333 covered a range of sexually explicit topics, including a discussion of Danuta333's experience with cunnilingus and fellatio and the defendant's preferences regarding the same, as well as Danuta333's breast size. Approximately midway through the conversation,[13] the defendant asked Danuta333 if she wanted to meet him, and the following discussion ensued:

"JoeSkotr: How about next week . . . ?

"Danuta333: maybe that will work, how?

"JoeSkotr: E-mail me with the day that is best. I can do it during the day if that helps . . . .

"Danuta333: ok, but i am 13, i don't drive"

A discussion of potential meeting places followed, during which Danuta333 noted that she had "school and stuff and no car ride . . . ." Danuta333 ended the conversation after the defendant had instructed her to e-mail him with the name of a hotel where they could meet.

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[13] We hereinafter refer to the instant messaging between the defendant and Danuta333 as conversations or discussions.

From approximately January 4, 2000, until March 13, 2000, the defendant and Danuta333 engaged in between twenty and thirty online conversations, the majority of which were sexually explicit in nature. During this period, the defendant e-mailed Danuta333 several still images depicting females of a variety of ages, some of whom were engaged in sexual acts, as well as a video clip depicting an adult female holding ejaculate in her mouth and then swallowing it on command. The defendant represented to Danuta333 that two of the still images depicted a thirteen year old female. On several occasions, the defendant requested that Danuta333 send him a photograph of herself. Using law enforcement software, Wardwell created an image purporting to be a middle school yearbook photograph of Danuta333 and sent the image to the defendant.

The defendant and Danuta333 eventually agreed to meet on March 8, 2000, at a donut shop in New Britain. During an online conversation on March 7, 2000, the defendant explained exactly what Danuta333 was to do for him sexually when she entered his van.[14] On March 8, 2000, the defendant traveled to

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[14] As early as their first online conversation, the defendant told Danuta333 that he wanted her to wear a skirt when they met in person, that he "expect[ed]" Danuta333 to perform fellatio on him in "return" for performing cunnilingus on her, and that he wanted to take a photograph of Danuta333 with his ejaculate in her mouth. In a conversation on January 10, 2000, the defendant instructed Danuta333 in more detail as to exactly what he wanted her to do upon meeting him for the first time. That online conversation proceeded in relevant part:

> "JoeSkotr: You will get in my van and start playing with my balls.
> "Danuta333: okay
> "JoeSkotr: I will tell you how I want you dressed . . .
> "Danuta333: kewl
> "JoeSkotr: A skirt (short) White blouse . . .
> "Danuta333: i got those :)
> "JoeSkotr: The blouse will be sheer . . .

Connecticut but went to the wrong donut shop. On March 9, 2000, the defendant and Danuta333 arranged a second meeting for March 14, 2000, at a shopping plaza in New Britain. On

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"Danuta333: ok, maybe I can borrow a [friend's]
"JoeSkotr: You will NOT have a bra on . . .
"Danuta333: whatever you want
"JoeSkotr: Once you get in You will remove your panties
"Danuta333: k
"JoeSkotr: I want to see what you are offering me d . . .
"Danuta333: u will like . . . i can do all of that
"JoeSkotr: I would also like to see the ass I may take . . .

* * *

"JoeSkotr: You know what I want d . . . ?
"Danuta333: what
"JoeSkotr: YOU as mine . . .
"Danuta333: k
"Danuta333: :)
"JoeSkotr: Before you say that what does that mean to you . . . ?
"Danuta333: u wanna have me for sex . . .
"JoeSkotr: Yes"

On March 6, 7 and 13, 2002, the defendant directed Danuta333 through the same essential sequence of events using language virtually identical to that used in the foregoing conversation. On each of those dates, however, the defendant made certain additional demands. For example, on March 6, the defendant stated, "You will 'show' what I ask When I ask . . . . That includes the pussy you hold for me and your breasts. . . . In my van." The defendant further instructed Danuta333 that he wanted her to perform fellatio on him. In the conversation of March 7, the defendant repeated that he expected Danuta333 to "blow" him and to "hold [his ejaculate] in [her] mouth until" he told her to "swallow it . . . ." On March 13, the defendant told Danuta333 that she would perform fellatio on him "three times" and that he would bring a videotape that she could watch while she performed.

We also note that, shortly after initiating his online conversations with Danuta333, the defendant introduced a theme of sexual dominance and submission into those conversations, referring to Danuta333 as his "sub" and requesting that she refer to him as "Sir." This theme pervaded their sexual dialogue, with the defendant telling Danuta333, among other things, what she would be required to do when they met and ordering her to masturbate at his command.

that date, the defendant arrived at the shopping plaza as planned and, upon exiting his vehicle, was arrested by officers of the New Britain police department. After being advised of his *Miranda*[15] rights, the defendant gave an oral statement to the police in which he admitted that, for several months, he had communicated over the Internet with "Dontra,"[16] whom he had met in a chat room. The defendant acknowledged that he had come to New Britain to meet her but stated that he had intended to tell her that he was just "goofing," and to thank her for speaking with him online.

The police obtained a search warrant for the defendant's vehicle. Upon executing the warrant, they found a Massachusetts Turnpike receipt dated March 14, 2000, maps of New Britain, and a cellular telephone with a number that corresponded to a number that the defendant had given Danuta333 in their online conversation the previous day. The vehicle also was equipped with a videocassette recorder containing a video entitled "24 Hour Lip Service" that was cued to a scene depicting an adult female performing fellatio on an adult male.[17] Later that day, the police also obtained and executed a search warrant for the defendant's home in Massachusetts. Police seized the defendant's computer, a search of which revealed evidence of electronic communications between JoeSkotr and Danuta333, the

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[15] *Miranda* v. *Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

[16] The defendant had referred to Danuta333 as "d" throughout their online conversations.

[17] In a prior online conversation, the defendant had informed Danuta333 that he had a van equipped with a television and videocassette recorder that they could use to watch "bad" movies, including one entitled "Submissive [S]luts."

defendant's receipt of Wardwell's composite images of Danuta333 and the images that the defendant had sent to Danuta333. Additional facts and procedural history will be set forth as necessary.

I

We first address the defendant's contention that attempt to commit sexual assault in the second degree in violation of §§ 53a-71 (a) (1) and 53a-49 (a) (2), and attempt to commit risk of injury to a child in violation of §§ 53-21 and 53a-49 (a) (1) are not cognizable crimes.[18] With respect to the former offense, the defendant maintains that § 53a-71 (a) (1) is a strict liability crime and, therefore, cannot be the subject of an attempt. With respect to the latter offense, the defendant contends that, because neither § 53-21 (1) nor § 53-21 (2) is a specific intent offense, they, too, cannot be the subject of an attempt. We reject the defendant's claims, which we address in turn.

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[18] The defendant acknowledges that, as with most of the other constitutional claims that he has raised on appeal, he did not preserve these particular claims at trial. Accordingly, he seeks to prevail under *State* v. *Golding*, 213 Conn. 233, 567 A.2d 823 (1989), in which we held that "a defendant can prevail on a claim of constitutional error not preserved at trial only if *all* of the following conditions are met: (1) the record is adequate to review the alleged claim of error; (2) the claim is of constitutional magnitude alleging the violation of a fundamental right; (3) the alleged constitutional violation clearly exists and clearly deprived the defendant of a fair trial; and (4) if subject to harmless error analysis, the state has failed to demonstrate harmlessness of the alleged constitutional violation beyond a reasonable doubt." (Emphasis in original.) Id., 239–40. Although the record is adequate for review of all of the defendant's unpreserved constitutional claims, including his claim that the offenses of attempt to commit sexual assault in the second degree and attempt to commit risk of injury to a child are not cognizable crimes, for reasons that we discuss hereinafter, he cannot prevail on his *Golding* claims because he cannot establish a constitutional violation.

A

To demonstrate a violation of § 53a-71 (a) (1), sometimes referred to as statutory rape; see *State* v. *Jason B.*, 248 Conn. 543, 553, 729 A.2d 760, cert. denied, 528 U.S. 967, 120 S. Ct. 406, 145 L. Ed. 2d 316 (1999); the state must establish that the accused engaged in sexual intercourse with a person who, at that time, was at least thirteen years of age but under sixteen years of age, and that the accused was more than two years older than the other person. See General Statutes § 53a-71 (a) (1). "[T]he only intent required for a violation of § 53a-71 is a general intent to perform the acts that constitute the offense." *State* v. *Pierson*, 201 Conn. 211, 216, 514 A.2d 724 (1986); accord *State* v. *Plude*, 30 Conn. App. 527, 534–35, 621 A.2d 1342, cert. denied, 225 Conn. 923, 625 A.2d 824 (1993). In other words, "[s]exual assault in the second degree is a general intent crime that requires only that the actor possess a general intent to perform the acts that constitute the elements of the offense." (Internal quotation marks omitted.) *State* v. *Raynor*, 84 Conn. App. 749, 759 n.6, 854 A.2d 1133, cert. denied, 271 Conn. 935, 861 A.2d 511 (2004). Thus, under § 53a-71 (a) (1), the state is not required to establish that the accused knew that the person with whom he had sexual intercourse was under the age of sixteen; the state must prove only that the accused knowingly engaged in sexual intercourse with a person who, in fact, had not attained the age of sixteen. See, e.g., *State* v. *Plude*, supra, 534.

Under General Statutes § 53a-49 (a) (2), "[a] person is guilty of an attempt to commit a crime if, acting with the kind of mental state required for commission of the crime, he . . . intentionally does or omits to do anything which, under the circumstances as he believes them to be, is an act or omission constituting a substantial step in a course of conduct planned to culminate in his commission of the crime." "Proof of an attempt to commit a specific offense requires proof that the

actor intended to bring about the elements of the completed offense." *State* v. *Hinton*, 227 Conn. 301, 316, 630 A.2d 593 (1993). Moreover, "to be guilty of attempt, a defendant's conscious objective must be to cause the result which would constitute the substantive crime." *State* v. *Foster*, 202 Conn. 520, 528, 522 A.2d 277 (1987).

The defendant's claim that attempt to commit assault in the second degree is not a cognizable offense rests on his assertion that assault in the second degree in violation of § 53a-71 (a) (1) "looks and feels like a strict liability crime," that is, a crime for which no intent is necessary. Relying on his characterization of § 53a-71 (a) (1) as a strict liability crime, the defendant argues, in essence, that an attempt to commit such a strict liability crime cannot be reconciled with the fact that, to prove attempt under § 53a-49, the state must establish that the defendant acted "with the kind of mental state required for commission of the crime . . . ." General Statutes § 53a-49 (a); see 2W. LaFave, Substantive Criminal Law (2003) § 11.3, p. 211 ("[u]nder the prevailing view, an attempt . . . cannot be committed by recklessness or negligence or on a strict liability basis, even if the underlying crime can be so committed"); see also 2 W. LaFave, supra, § 11.3 (c), p. 217 (expressing view that no sound policy reason exists for extending concept of strict liability to law of attempt).

The defendant's argument fails, however, because, as we have explained, the offense of sexual assault in the second degree is not a strict liability crime; rather, it is a general intent crime. See *State* v. *Pierson*, supra, 201 Conn. 216; *State* v. *Raynor*, supra, 84 Conn. App. 759 n.6; *State* v. *Plude*, supra, 30 Conn. App. 534–35. The fact that the state is not required to establish that the accused knew that his victim was under sixteen years of age does not transform the offense into a strict liability offense because the state still must establish that the accused had the general intent to have sexual intercourse with

the victim.[19] Thus, we agree with other courts that have

[19] It is true, of course, that the "victim" in the present case was not a person at all, let alone a person under the age of sixteen. The defendant has not claimed, however, that that fact has any bearing on his contention that attempt to commit assault in the second degree is not a cognizable crime. In other words, the defendant makes no claim that that offense is not a cognizable crime under the particular circumstances of this case.

We note, moreover, that the state alleged, in the two counts of the information charging the defendant with attempt to commit sexual assault in the second degree, that, on or about March 8, 2000, and March 14, 2000, respectively, the defendant, "acting with the requisite mental state to commit sexual assault in the second degree, did intentionally engage in conduct which, under the circumstances as he believed them to be, would constitute a substantial step in the commission of the crime of sexual assault in the second degree, to wit: traveling to the city of New Britain for the purpose of engaging in sexual intercourse with a person he believed to be a [thirteen] year old female, said conduct being in violation of § 53a-49 (a) (2) . . . [and] § 53a-71 (a) (1) . . . ." Thus, the state expressly assumed the burden of establishing that the defendant knew that the victim was thirteen years of age. As we have explained, the state normally would not be required to prove that fact because, under § 53a-71 (a) (1), the state is not required to establish that an accused knew that the victim was underage. In the circumstances of this case, however, in which the victim, Danuta333, was not a real person, the state was required to prove that the defendant believed that Danuta333 was thirteen years of age because, in the absence of such proof, the state could not establish a crime at all. In other words, for purposes of this case, which arises out of an Internet sting operation, because there was no *actual* person under the age of sixteen with whom the defendant was attempting to have sexual intercourse, the state necessarily had to prove that the defendant *believed* that there was a person under that age with whom he was going to engage in sexual intercourse. In the absence of such proof, the state would have established only that the defendant was seeking to meet a person of unknown age for the purpose of having sexual intercourse. Such proof would have been inadequate to establish an attempt by the defendant to commit any crime, letalone the specific crime that the state believed that the defendant was predisposed to commit, namely, sexual intercourse with a person less than sixteen years of age. As we indicated previously, however, the fact that the state assumed that burden in this case does not bear upon the defendant's broader claim, namely, that an attempt to commit sexual assault in the second degree is not a cognizable crime regardless of whether the victim is a real person.

addressed the issue that the crime of attempt to commit statutory rape is a recognized offense. E.g., *State* v. *Sines*, 158 N.C. App. 79, 84, 579 S.E.2d 895, cert. denied, 357 N.C. 468, 587 S.E.2d 69 (2003); *State* v. *Chhom*, 128 Wash. 2d 739, 744, 911 P.2d 1014 (1996); *State* v. *Brienzo*, 267 Wis. 2d 349, 363–64, 671 N.W.2d 700 (2003). We therefore reject the defendant's claim that the crime of attempt to commit sexual assault in the second degree is not a cognizable offense.[20]

B

The defendant also contends that the offense of attempt to commit risk of injury to a child under either subdivision (1) or

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[20] In its brief to this court, the state advances the view that, to prove the crime of attempt to commit assault in the second degree, it was required to establish both that the defendant intended to have sexual intercourse with the victim *and* that the defendant knew that the victim was under sixteen years of age. In light of the requirement of § 53a-49 (a) that a person be found to have acted "with the kind of mental state required for commission of the crime," and because § 53a-71 (a) (1) does not require proof of the defendant's knowledge that the victim is less than sixteen years old, we are unclear as to why the state has taken the broad position that it bears the burden of proving that an accused charged with an attempt to violate § 53a-71 (a) (1) knew that the victim was less than sixteen years of age. As we have explained; see footnote 19 of this opinion; the state understandably, and properly, assumed that burden in this Internet sting case, but the state's position appears to be that it would be required to assume that burden even in a case involving a real victim. Even if the state is correct in its analysis, our resolution of the defendant's claim would be the same: attempt to commit assault in the second degree is a cognizable offense. Moreover, as we explain hereinafter; see part II of this opinion; the evidence amply supported a finding that the defendant believed that the victim was thirteen years old.

(2) of § 53-21 is not a cognizable crime because neither offense imposes a specific intent requirement.[21] We disagree.

We first address the defendant's claim with respect to the offense of attempt to commit risk of injury to a child in violation of §§ 53-21 (1) and 53a-49 (a) (1), the former of which prohibits, inter alia, a person from wilfully placing a child under the age of sixteen in such a situation that the child's health is likely to be injured or the child's morals are likely to be impaired. As this court previously has observed, that offense is a general intent crime. E.g., *State* v. *McClary*, 207 Conn. 233, 240, 541 A.2d 96 (1988); *State* v. *Reid*, 85 Conn. App. 802, 809–10, 858 A.2d 892, cert. denied, 272 Conn. 908, 863 A.2d 702 (2004). Thus, "[i]t is not necessary, to support a conviction under § 53-21, that the [accused] be aware that his conduct is likely to impact a child younger than the age of sixteen years. Specific intent is not a necessary requirement of the statute. Rather, the intent to do some act coupled with a reckless disregard of the consequences . . . of that act is sufficient to [establish] a violation of the statute." (Citation omitted; internal quotation marks omitted.) *State* v. *Davila*, 75 Conn. App. 432, 438, 816 A.2d 673, cert. denied, 264 Conn. 909, 826 A.2d 180 (2003), cert. denied, 543 U.S. 897, 125 S. Ct. 92, 160 L. Ed. 2d 166 (2004). For the same reasons that we have rejected the defendant's contention that sexual assault in the second degree, which also is a general intent crime, cannot be the subject of an attempt; see part I A of this opinion; we also reject the defendant's assertion that risk of injury to a child in violation of § 53-21 (1) cannot be the subject of an attempt.

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[21] We note that, in the circumstances of this case, which arises out of an Internet sting operation that did not involve a real underage victim, the state necessarily undertook the burden of establishing that the defendant believed that the victim was under sixteen years of age. See footnote 19 of this opinion.

The defendant nevertheless maintains that, because § 53-21 (1) "covers the situation where there need be only a *risk* of injury [or impairment of morals] for the defendant to be convicted"; (emphasis in original) *State* v. *Branham*, 56 Conn. App. 395, 402, 743 A.2d 635, cert. denied, 252 Conn. 937, 747 A.2d 3 (2000); this court "should conclude that criminalizing an attempt to create a 'risk' or a threat, or 'endangerment,' comes perilously close to prohibiting an attempted attempt," which, of course, is not a crime. See, e.g., 4 F. Wharton, Criminal Law (15th Ed. Torcia 1996) § 693, p. 584 ("[t]here can be no attempt to commit a crime which is itself an attempt, i.e., there can be no attempt to commit an attempt"). We are not persuaded by the defendant's contention because, as he himself acknowledges, an attempt to commit risk of injury to a child is not a prohibited "attempted attempt." Moreover, we do not share the defendant's view that the offense of attempt to commit risk of injury to a child is so close to an attempted attempt that we are obliged to conclude that the offense is not legally cognizable, irrespective of the particular facts alleged.[22]

The defendant also claims that it is not a cognizable crime to attempt to commit risk of injury to a child under § 53-21 (2), which prohibits, inter alia, a person from having contact with the intimate parts of a child under sixteen years of age in a sexual and indecent manner likely to impair the morals of that child. The defendant raises no new argument in support of this claim, relying, instead, on the argument that he raised to

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[22] Moreover, as the state notes, in the present case, each of the counts of the information pursuant to which the state charged the defendant with attempt to commit risk of injury to a child under § 53-21 (1) alleged that the defendant intentionally, rather than recklessly; see, e.g., *State* v. *Davila*, supra, 75 Conn. App. 438 (intent to do some act coupled with reckless disregard of consequences of that act sufficient to establish violation of § 53-21); had engaged in conduct that was likely to injure or to impair the morals of a child under the age of sixteen.

support his contention that attempt to commit sexual assault in the second degree is not a cognizable offense. In light of our conclusion that the state is free to charge an attempt to commit a general intent crime such as § 53a-71 (a) (1), we also reject the defendant's claim that attempt to commit risk of injury to a child in violation of §§ 53-21 (2) and 53a-49 (a) (1) is not a cognizable offense.

II

The defendant next claims that the evidence adduced at trial was insufficient to support the jury's finding that he was guilty of the offenses of attempt to commit sexual assault in the second degree, attempt to commit risk of injury to a child, importing child pornography and attempt to entice a minor.[23] We reject the defendant's claims.

The following additional facts are necessary for our resolution of these claims. At trial, the state adduced the testimony of Wardwell, who, acting as Danuta333, communicated online with the defendant for more than two months. Wardwell testified about the sexually explicit content of his online conversations with the defendant. Printouts of the conversations that the state introduced into evidence revealed

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[23] We note, preliminarily, that the defendant does not claim that the fact that Danuta333 is not a real person bars his prosecution for any of those crimes under a theory of impossibility. "[S]ection [53a-49] sweeps aside any consideration of the defense of impossibility, including the distinction between so-called factual and legal impossibility. Under subsections (a) (1) and (2), the liability of the actor turns on his purpose, considered in the light of his beliefs, and not on what is actually possible under existing circumstances." Conn. Gen. Stat. Ann. § 53a-49 (West 2001), comment of the commission to revise the criminal statutes.

that Danuta333 affirmatively stated her age at least ten times,[24] and that, on numerous other occasions, she raised subjects of interest to a child of her young age, such as school, school vacation, sleepovers, not being able to drive, being called to dinner by her mother and being grounded. The defendant also expressly acknowledged that Danuta333 was a child, commented that Danuta333 was young enough to be his daughter,[25] told her that thirteen is "young" and questioned her

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[24] For example, Danuta333 stated: "u ever been with someone like me . . . u know 13 years old"; "that bother u that i'm 13 years"; "how is 13 fer u"; "but I AM just thirteen"; "13 is such a good number"; "u don't think 13 is too young for [anal sex]?"; "u think many kids my age do this kind of thing . . . as [young] as 13?"; and "bein[g] 13 is not all that great u know . . . ."

[25] In an earlier conversation, the defendant had mentioned that his daughter was thirteen years old. Later, the following conversation between the defendant and Danuta333 occurred:

"JoeSkotr: . . . You want to see the back of my van?

* * *

"Danuta333: see the back of ur van, yes.
"JoeSkotr: Did I hear Sir . . . ?
"Danuta333: yes Sir
"JoeSkotr: You know why I was pushing you d . . . ?
"Danuta333: not really Sir
"JoeSkotr: You are a minor

* * *

"Danuta333: when will i not be a minor
"JoeSkotr: 18
"Danuta333: oh
"JoeSkotr: Get it hun?
"Danuta333: i'm not sure what that has to do with pushin me on that, Sir
"JoeSkotr: There are two reasons d.
"Danuta333: what r they Sir
"JoeSkotr: First you are the age of my daughter.

* * *

"JoeSkotr: The second is I want to be sure you are real"

about whether she was comfortable with their age difference.[26] In one conversation, the defendant commented on the jail time he likely would receive if his relationship with Danuta333 were to be made "public."[27]

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[26] In the online conversation that occurred immediately after the defendant received the image purporting to be Danuta333, the defendant specifically asked, "Are you 'up' for this hun . . . ?" The defendant also asked, "You comfortable with you being your age and me being mine . . . ?" The defendant also acknowledged his age in relation to Danuta333's by noting in one conversation, "I am older you know . . . ." In other conversations, the defendant referred to himself as an " 'old' man" and to his "OLD memory," stated that he was having "a senior moment," and stated that "[he] wouldn't talk this frankly to a 9 year old . . . ." As the date of their scheduled meeting in New Britain approached, the defendant inquired again about Danuta333's age:

"JoeSkotr: If you have ANY reservations I don't want you there. UNDERSTOOD . . . ?
"Danuta333: yes Sir
"JoeSkotr: UNDERSTOOD . . . ?
"Danuta333: yes Sir
"Danuta333 why cus of our ages?
"JoeSkotr: Yes."

[27] Specifically, the defendant stated as follows:

"JoeSkotr: You realize I can't be public . . . ?
"Danuta333: what do u mean?
"JoeSkotr: Jail time . . .
"Danuta333: oh u mean be my boyfriend in public
"JoeSkotr: Yes
"JoeSkotr: Is that what you want . . . ?
"Danuta333: i know how to keep a secret if I have to
"JoeSkotr: It IS reality . . .
"Danuta333: jail time? is it real illegal?
"JoeSkotr: I'm not sure '[B]ubba' would be as kind to MY ass . . .
"Danuta333: who is [B]ubba?
"JoeSkotr: The guy in the cell block I will be in . . . ."

"In reviewing a sufficiency of the evidence claim, we apply a two-part test. First, we construe the evidence in the light most favorable to sustaining the verdict. Second, we determine whether upon the facts so construed and the inferences reasonably drawn therefrom the jury reasonably could have concluded that the cumulative force of the evidence established guilt beyond a reasonable doubt. . . . In evaluating evidence, the trier of fact is not required to accept as dispositive those inferences that are consistent with the defendant's innocence. . . . The trier may draw whatever inferences from the evidence or facts established by the evidence it deems to be reasonable and logical. . . . This does not require that each subordinate conclusion established by or inferred from the evidence, or even from other inferences, be proved beyond a reasonable doubt . . . because this court has held that a jury's factual inferences that support a guilty verdict need only be reasonable . . . .

"[A]s we have often noted, proof beyond a reasonable doubt does not mean proof beyond all possible doubt . . . nor does proof beyond a reasonable doubt require acceptance of every hypothesis of innocence posed by the defendant that, had it been found credible by the trier, would have resulted in an acquittal. . . . On appeal, we do not ask whether there is a reasonable view of the evidence that would support a reasonable hypothesis of innocence. We ask, instead, whether there is a reasonable view of the evidence that supports the jury's verdict of guilty. . . . Furthermore, [i]n [our] process of review, it does not diminish the probative force of the evidence that it consists, in whole or in part, of evidence that is circumstantial rather than direct. . . . It is not one fact, but the cumulative impact of a multitude of facts which establishes guilt in a case involving substantial circumstantial evidence." (Citations omitted; internal quotation marks omitted.) *State* v. *Padua*, 273 Conn. 138, 146–47, 869 A.2d 192 (2005). With

these principles in mind, we turn to each of the defendant's evidentiary insufficiency claims.

A

The defendant contends that the evidence adduced by the state was inadequate to prove that he had committed the offense of attempt to commit sexual assault in the second degree in violation of §§ 53a-71 (a) (1) and 53a-49 (a) (2). Specifically, the defendant asserts that the state failed to prove that he had: (1) had the intent to engage in sexual intercourse with Danuta333; (2) believed that Danuta333 was less than sixteen years old;[28] and (3) taken a substantial step in furtherance of the commission of a crime as § 53a-49 (a) (2) requires. We disagree.

With respect to the defendant's contention that the evidence was insufficient to establish that he had intended to engage in sexual intercourse with Danuta333, the jury learned that the defendant had initiated contact with Danuta333, an AOL member with a published profile indicating that she was thirteen, immediately after she entered and quickly exited a chat room entitled "I Love Much Older Men." After contacting Danuta333, the defendant asked if she had ever been with anyone his age and questioned her extensively about her prior sexual experiences to determine whether she "had the experience [he] want[ed] . . . ." During this first conversation with Danuta333, the defendant inquired as to whether she wanted to meet in person, and, thereafter, they discussed specific times and locations for a meeting. The defendant continued to engage Danuta333 in online conversations of a

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[28] As we have explained, the state alleged that the defendant had knowledge of Danuta333's age and, because of the nature of the Internet sting operation that gave rise to the charges against the defendant, necessarily assumed the burden of proving the defendant's knowledge in that regard. See footnote 19 of this opinion.

sexually graphic nature, arranged to meet Danuta333 in person, described the sex acts that he expected Danuta333 to perform upon entering his van, and drove from Massachusetts to Connecticut on March 8, 2000, to execute his plan. Upon failing to find the prearranged meeting place, the defendant returned to Massachusetts, set up a second meeting for March 14, 2000, and told Danuta333 that she was to perform the same sex acts that he had planned for their unsuccessful first encounter. The defendant also stated that he would bring a videotape for her to watch while she performed. The defendant then drove to Connecticut a second time to meet Danuta333, and brought with him a videocassette player containing a videotape that was cued to a scene depicting an adult female performing fellatio. This evidence clearly was sufficient to establish that the defendant intended to have sexual intercourse with Danuta333 upon meeting her in Connecticut.

The defendant also asserts that the state failed to prove that he believed that he was communicating with a person less than sixteen years old. This argument also fails. On appeal, "[w]e first construe the evidence presented at trial in a manner favorable to sustaining the verdict, and then determine whether the jury could reasonably have found, upon the facts established and the inferences reasonably drawn therefrom, that the cumulative effect of the evidence established guilt beyond a reasonable doubt." *State* v. *Crafts*, 226 Conn. 237, 243, 627 A.2d 877 (1993). "[T]he jury may draw reasonable, logical inferences from the facts proven . . . ." *State* v. *Brown*, 235 Conn. 502, 534, 668 A.2d 1288 (1995). In the present case, the evidence established convincingly that the defendant believed that Danuta333 was thirteen years old and, with that knowledge, intended to engage in sexual intercourse with her. As we have indicated, both Danuta333 and the defendant expressly and repeatedly referred to and discussed Danuta333's purported age. This evidence was more than sufficient to permit

the jury to find that the defendant believed that Danuta333 was under the age of sixteen.

The defendant further asserts that the state failed to prove that he had taken a substantial step in furtherance of the commission of the crime of sexual assault in the second degree. Under General Statutes § 53a-49 (b), "[c]onduct shall not be held to constitute a substantial step . . . unless it is strongly corroborative of the actor's criminal purpose." Legally sufficient examples of strongly corroborative conduct include "enticing or seeking to entice the contemplated victim of the crime to go to the place contemplated for its commission"; General Statutes § 53a-49 (b) (2); and the "possession of materials to be employed in the commission of the crime, which are specially designed for such unlawful use or which can serve no lawful purpose of the actor under the circumstances . . . ." General Statutes § 53a-49 (b) (5). "What constitutes a 'substantial step' in any given case is a question of fact." *State* v. *Green*, 194 Conn. 258, 277, 480 A.2d 526 (1984), cert. denied, 469 U.S. 1191, 105 S. Ct. 964, 83 L. Ed. 2d 969 (1985). In general terms, however, "[a] substantial step must be something more than mere preparation, yet may be less than the last act necessary before the actual commission of the substantive crime, and thus the finder of fact may give weight to that which has already been done as well as that which remains to be accomplished before commission of the substantive crime. . . . In order for behavior to be punishable as an attempt, it need not be incompatible with innocence, yet it must be necessary to the consummation of the crime and be of such a nature that a reasonable observer, viewing it in context could conclude beyond a reasonable doubt that it was

undertaken in accordance with a design to violate the statute."[29] (Citation omitted.) *United States* v. *Manley*, 632 F.2d 978, 987–88 (2d Cir. 1980), cert. denied sub nom. *Williams* v. *United States*, 449 U.S. 1112, 101 S. Ct. 922, 66 L. Ed. 2d 841 (1981).

The defendant claims that driving to meet Danuta333 at the parking lot was insufficient to constitute a substantial step for purposes of § 53a-49 (b) because that meeting place was not necessarily intended to be "the place contemplated" for the

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[29] We note, as well, the following observations by Judge Henry Friendly regarding the type of evidence necessary to establish an attempt. "Many of our country's most distinguished judges have labored over the definition of an attempt, see, e.g., *Commonwealth* v. *Peaslee*, 177 Mass. 267, 272, 59 N.E. 55 (1901) (Holmes, J.); *People* v. *Werblow*, 241 N.Y. 55, 61–62, 148 N.E. 786 (1925) (Cardozo, J.); *United States* v. *Coplon*, 185 F.2d 629, 632–33 ([2d] Cir. 1950) [(Hand, J.)], cert. denied, 342 U.S. 920, 72 S. Ct. 362, 96 L. Ed. 688 (1952) . . . and over the years various approaches have been urged. Some courts and commentators have asked whether there was a physical or dangerous proximity to success; others whether the actor had reached a point where it was unlikely that he would have voluntarily desisted; still others whether the actor's conduct was by itself unequivocal evidence of criminal intent. . . . The drafters of the Model Penal Code considered and rejected all previous formulations in favor of one which provides, so far as here relevant, that '[a] person is guilty of an attempt . . . if, acting with the kind of culpability otherwise required for commission of the crime, he . . . purposely does or omits to do anything which, under the circumstances as he believes them to be, is an act or omission constituting a substantial step in a course of conduct planned to culminate in his commission of the crime.' [Model Penal Code § 5.01 (1) (c) (Proposed Official Draft 1962)]. Conduct 'shall not be held to constitute a substantial step . . . unless it is strongly corroborative of the actor's criminal purpose.' [Id., § 5.01 (2)]. This definition, by shifting the emphasis from what remains to be done to what the actor already has done, was designed to widen the ambit of attempt liability, consistent with the drafters' belief that the proper concern of the law of attempts is the dangerousness of the actor, as a person manifesting a firm disposition to commit a crime, not the dangerousness of his conduct." (Citations omitted.) *United States* v. *Ivic*, 700 F.2d 51, 66 (2d Cir. 1983).

commission of the crime. General Statutes § 53a-49 (b) (2). Specifically, the defendant relies on several conversations in which he and Danuta333 had discussed the possibility of meeting at a hotel or first meeting at a parking lot and then driving to a nearby wooded area to have sexual intercourse. The defendant contends that those conversations suggest that he did not intend to engage in any sexual activity with Danuta333 in the parking lot.

As the defendant correctly notes, our case law concerning attempts to commit sexual assault generally has involved a defendant who is in the presence of the victim.[30] Thus, we never have considered the applicability of § 53a-49 (b) (2) to the precise scenario presented by this case. A decided majority of the courts that have considered the issue, however, have concluded that the conduct of a suspect who, for the purpose ultimately of having sex with a person whom the suspect believes to be a child, travels to a prearranged location to meet that child, is sufficient to constitute a substantial step in furtherance of the planned sex crime. See, e.g., *United States* v. *Meek*, 366 F.3d 705, 720 (9th Cir. 2004); *United States* v. *Root*, 296 F.3d 1222, 1228 (11th Cir. 2002), cert. denied, 537 U.S. 1176, 123 S. Ct. 1006, 154 L. Ed. 2d 921 (2003); *United States* v. *Farner*, 251 F.3d 510, 511, 513 (5th Cir. 2001); *Kirwan* v. *State*, 351 Ark. 603, 615, 96 S.W.3d 724 (2003); *Dennard* v. *State*, 243 Ga. App. 868, 873, 534 S.E.2d 182 (2000), cert. denied, Docket No. S00C1515, 2000 Ga. LEXIS 839 (October 27, 2000); *State* v. *Glass*, 139 Idaho 815, 820, 87 P.3d 302 (2003); *People* v. *Scott*, 318 Ill. App. 3d 46, 55, 740 N.E.2d 1201 (2000), cert. denied, 194 Ill. 2d 579, 747 N.E.2d 356

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[30] E.g., *State* v. *Wilcox*, 254 Conn. 441, 468–69, 758 A.2d 824 (2000); *State* v. *Milardo*, 224 Conn. 397, 400–401, 404, 618 A.2d 1347 (1993); *State* v. *Lapia*, 202 Conn. 509, 510, 513–14, 522 A.2d 272 (1987); *State* v. *Green*, supra, 194 Conn. 259–60.

(2001); *State* v. *Young*, 139 S.W.3d 194, 197 (Mo. App. 2004); *State* v. *Brienzo*, supra, 267 Wis. 2d 366. The defendant urges us to adopt the minority position, embraced by two states,[31] that such acts are not sufficient to prove the defendant's attempt to commit the sex crime. We decline to do so because we conclude that such conduct falls well within the term "substantial step."

In the present case, the defendant engaged in a series of sexually explicit conversations with Danuta333 detailing exactly what sexual acts he expected her to perform upon entering his van. Moreover, in at least three of these conversations, the defendant specifically referred to his vehicle as the place where the sexual acts would occur.[32] The defendant twice arranged to meet Danuta333 and twice drove from Massachusetts to Connecticut to execute that plan, arriving in Connecticut the second time with a pornographic videotape in his vehicle cued to a woman performing fellatio. Contrary to the defendant's claim, the evidence was sufficient for the jury to find that the defendant had taken a substantial step in furtherance of the commission of the crime of attempt to commit sexual assault in the second degree.

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[31] See *State* v. *Duke*, 709 So. 2d 580, 582 (Fla. App. 1998); *State* v. *Kemp*, 753 N.E.2d 47, 51 (Ind. App. 2001), transfer denied, 783 N.E.2d 693 (Ind. 2002).

[32] In one such conversation, the defendant told Danuta333 that she would "get in [his] van and start playing with [his] balls." In another conversation, the defendant ordered Danuta333 to " 'show' what I ask When I ask . . . [i]n my van." In another conversation, the defendant asked Danuta333, "You want to see the back of my van . . . ?" In one of those conversations, Danuta333 asked if anybody would see them having sex in his van, and the defendant replied, "No." The defendant also suggested that they would be having sex in his vehicle when he told Danuta333 that she could watch a pornographic video while she performed.

B

The defendant next contends that the evidence was insufficient to support his conviction of attempt to commit risk of injury to a child. The defendant raises the same claims that he has raised in support of his challenge to the evidentiary sufficiency of his conviction of attempt to commit sexual assault in the second degree, namely, that the state failed to prove that he had: (1) intended to have sexual intercourse with the victim; (2) believed that the victim was less than sixteen years old; and (3) taken a substantial step in furtherance of the commission of the substantive crime. In support of his claim, the defendant relies on the same alleged evidentiary insufficiencies that he has relied on to support his claim that the state failed to prove that he had attempted to commit sexual assault in the second degree. For the same reasons that we rejected the defendant's evidentiary sufficiency claim with respect to his conviction of attempt to commit sexual assault in the second degree, we also reject his identical claim with respect to his conviction of attempt to commit risk of injury to a child.

C

The defendant also maintains that the evidence was insufficient to support his conviction of importing child pornography, which was predicated on the defendant's transmission of certain photographs of a young female to Danuta333 via electronic mail. The defendant argues that the state failed to prove that: (1) the person depicted in the photographs was real and under sixteen years of age; (2) the images depicted "a live performance or photographic or other visual reproduction of a live performance which depicts a minor in a prohibited sexual act"; General Statutes (Rev. to

1999) § 53a-193 (13);[33] and (3) the defendant imported or caused to be imported child pornography into the state. We reject each of these claims.

To establish the charge of importing child pornography, the state relied on two photographs that the defendant had sent to Danuta333 over the Internet depicting a young female wearing only panties. With respect to those two images, the defendant told Danuta333 that he had a photograph "of a 13 year old that [he did] know." The defendant further informed Danuta333 that the girl in the photograph lived in the "Hartford area . . . [n]ot too far from" Danuta333. Although the defendant indicated that he had not taken the photographs, he stated that he knew that the girl depicted in the photographs was thirteen because "[s]he said so."[34]

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[33] Hereinafter, all references to § 53a-193 (13) are to the 1999 revision.

[34] The following is an online conversation between the defendant and Danuta333 regarding those two photographs:

"Danuta333: u know that girl?
"JoeSkotr: No. But I have one of a 13 year old that I do know .
. .
"Danuta333: u do??
"JoeSkotr: Yes.

* * *

"JoeSkotr: You want to see . . . She likes me to share her pics .
. .
"Danuta333: if you want to share . . .
"JoeSkotr: Just her's . . . Not your's . . .
"Danuta333: u r sooo sweet!
"JoeSkotr: And you have mail . . .
"Danuta333: k, [I'll] look
"Danuta333: she's pretty
"JoeSkotr: Yes.
"Danuta333: yeah she looks a lot more like me

* * *

"JoeSkotr: Want [another] angle . . . ?

General Statutes (Rev. to 1999) § 53a-196c (a) provides that "[a] person is guilty of importing child pornography when, with intent to promote child pornography, he knowingly imports or causes to be imported into the state any child pornography of known content and character." General Statutes (Rev. to 1999) § 53a-193 (13) defines "child pornography" as "any material involving a live performance or photographic or other visual reproduction of a live performance which depicts a minor in a prohibited sexual act."[35] General Statutes § 53a-193 (11) defines "performance" as "any play, motion picture,

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"Danuta333: kewl!
"JoeSkotr: Look again . . .
"Danuta333: k
"JoeSkotr: She's also from CT
"Danuta333: KEWL!!!!
"JoeSkotr: Still think your [sic] a little bigger . . . ?
"Danuta333: she is very MUCH like my body

* * *

"Danuta333: how do ya know she's 13?

* * *

"JoeSkotr: She said so.
"Danuta333: oh does she live near me?

* * *

"JoeSkotr: She's from the Hartford area . . . [n]ot too far from you."

[35] We note that, in light of the requirements of § 53a-193 (13), the trial court instructed the jury that, for purposes of § 53a-196c (a), it was required to find that the photographs that the defendant sent to Danuta333 depict an actual person under the age of sixteen. Consequently, the defendant's prosecution for that offense did not run afoul of *Ashcroft* v. *Free Speech Coalition*, 535 U.S. 234, 122 S. Ct. 1389, 152 L. Ed. 2d 403 (2002), in which the United States Supreme Court struck down, on first amendment grounds, a portion of the Child Pornography Prevention Act of 1996, 18 U.S.C. §§ 2251 through 2260 (2000), that had proscribed the possession of virtual child pornography, that is, images appearing to depict minors but that are produced without using real children. *Ashcroft* v. *Free Speech Coalition*, supra, 241, 256, 258 (concluding that subparagraphs [B] and [D] of 18 U.S.C. § 2256 [8] were overbroad).

dance or other exhibition performed before an audience." Finally, General Statutes § 53a-193 (3) defines "prohibited sexual act" as, inter alia, "nude performance," which includes "the showing of the female breast with less than a fully opaque covering of any portion thereof below the top of the nipple . . . ." General Statutes § 53a-193 (4).

Contrary to the defendant's claims that the evidence failed to establish that the photographs were not real and that the person depicted in the images was under the age of sixteen, the defendant personally verified both the authenticity of the photographs and the age of the female appearing in those photographs. The jury also viewed the images, each of which depicts the same young girl.[36] The images are clear and readily discernable. That viewing, coupled with the defendant's representations, was sufficient to permit a jury to find that the photographs depicted a real, thirteen year old girl, naked from the waist up.[37]

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[36] We also have viewed the photographs, which appear to depict a young female under the age of sixteen.

[37] In support of his contrary contention, the defendant refers to the trial court testimony of his expert, Peter Miles, a computer technician and consultant specializing in computer graphics and design, about the process of computer digital imaging, that is, the process whereby an image or photograph is scanned into a computer and turned into a digital file. Among other things, Miles testified that once an image is converted into a digital file, it can be edited with readily available and inexpensive technology. Miles further testified that he could not determine whether the two images that the state had introduced into evidence to prove the defendant's guilt with respect to the charge of importing child pornography depicted a real person because those images, having been digital images, were capable of being altered without traces of alteration. On the basis of the evidence adduced by the state, however, the jury was free, notwithstanding Miles' testimony, to conclude that the photographs depicted a real person.

The defendant also claims that the state should have been required to adduce expert testimony to prove that the images depicted a real person under sixteen years of age. In support of his claim, the defendant underscores the fact that "new technology . . . makes it possible to create realistic images of children who do not exist." *Ashcroft* v. *Free Speech Coalition*, 535 U.S. 234, 240, 122 S. Ct. 1389, 152 L. Ed. 2d 403 (2002).

We agree that, at least in some cases, it may be difficult for a lay observer to distinguish between real and virtual images. As the defendant acknowledges, however, the vast majority of courts have rejected the claim that, in light of technological advances, the prosecution, in every case, must present expert testimony to establish that a particular image depicts a real child. E.g., *United States* v. *Slanina*, 359 F.3d 356, 357 (5th Cir.), cert. denied, 543 U.S. 845, 125 S. Ct. 288, 160 L. Ed. 2d 73 (2004); *United States* v. *Kimler*, 335 F.3d 1132, 1142 (10th Cir.), cert. denied, 540 U.S. 1083, 124 S. Ct. 945, 157 L. Ed. 2d 759 (2003); *People* v. *Phillips*, 215 Ill. 2d 554, 571–75, 831 N.E.2d 574 (2005); see also *United States* v. *Deaton*, 328 F.3d 454, 455 (8th Cir. 2003); *United States* v. *Hall*, 312 F.3d 1250, 1260 (11th Cir. 2002), cert. denied, 538 U.S. 954, 123 S. Ct. 1646, 155 L. Ed. 2d 502 (2003). Indeed, he cites to no contrary authority. In the absence of any persuasive support for the view advocated by the defendant,[38] we see no compelling reason to

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[38] In his initial brief, the defendant cited to one case, namely, *United States* v. *Hilton*, 363 F.3d 58, 64 (1st Cir. 2004) (holding that government "must introduce relevant evidence in addition to the [alleged pornographic] images" to prove that images depict real child), to support his claim that the state was required to adduce expert testimony to establish that the photographs introduced into evidence by the state depicted a real child. As the defendant acknowledged in his reply brief, however, on petition for rehearing, the panel in *Hilton* withdrew its decision and issued a new opinion; *United States* v. *Hilton*, 386 F.3d 13 (1st Cir. 2004); that does not contain the language of the withdrawn opinion providing that the government must adduce evidence in addition to the image itself—in the

adopt a special rule of evidence for cases such as the present case, which involves images transmitted over the Internet. Although we cannot conclude, in light of evolving technology, that such a rule never will be necessary, we believe that "[j]uries are still capable of distinguishing between real and virtual images; and admissibility remains within the province of the sound discretion of the trial judge." *United States* v. *Kimler*, supra, 1142; accord *United States* v. *Slanina*, supra, 357.

The defendant further maintains that the state failed to present evidence either of a "live performance" or of a performance "before an audience" within the meaning of General Statutes (Rev. to 1999) § 53a-193 (11) and (13). This claim is foreclosed by our decision in *State* v. *Ehlers*, 252 Conn. 579, 750 A.2d 1079 (2000). In *Ehlers*, we explained that a live performance held before an audience "means that there must be some recording or viewing of, or listening to, a live performance, or a reproduction of a live performance, by a person or persons other than the person or persons simultaneously engaged in the performance. The number of such persons recording, viewing or listening to the performance and whether they actually are present at the live performance or depicted in reproductions of it are irrelevant for purposes of determining whether an audience exists. Thus, an audience . . . could consist of a single photographer of the live performance, whether or not he or she actually was present at the performance or ever viewed the photographs, or a single person viewing photographs of the performance, whether or not any spectator was present at the live performance or depicted in the

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form of expert testimony or otherwise—to establish that the child depicted in the image is real. "Thus, at this time, it appears that no [federal] circuit [court of appeals] requires that expert evidence be introduced to prove the reality of children portrayed in pornographic images." *United States* v. *Farrelly*, 389 F.3d 649, 654 n.4 (6th Cir. 2004).

photographs." Id., 595–96. We also stated that, "if a person engaged in the performance himself records the performance, or views or listens to material depicting a reproduction of a performance in which he participated, he will constitute an audience . . . ." Id., 595 n.18. We concluded that "[t]his commonsense interpretation of the statute advances the legislative purpose of protecting children by targeting the market for child pornography." Id., 596. Because the images that the state introduced into evidence in the present case fall within the relevant statutory definitions as construed by this court in *Ehlers*, the defendant's claim is unavailing.[39]

The defendant also contends that the state failed to prove that the defendant imported or caused to be imported child pornography into the state. Specifically, the defendant maintains that the state's evidence established only that he sent the images to AOL in Virginia and that Wardwell actually imported those images into the state by opening the images on his computer in Connecticut.

It is true, of course, that those images were routed through and stored in AOL's server in Virginia until Wardwell retrieved the defendant's electronic mail and downloaded the images onto his computer in this state. That fact, however, does not negate the equally obvious fact that the defendant caused those images to be delivered to Danuta333's electronic mailbox in Connecticut by sending them to that mailbox over the Internet.

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[39] The defendant urges us to overrule *Ehlers* insofar as we held that selfrecording may be deemed to satisfy the audience requirement of the statute. Because we adhere to the reasons for our conclusion in *Ehlers* regarding the audience requirement; see *State* v. *Ehlers*, supra, 252 Conn. 594–96; we decline the defendant's invitation. We note, moreover, that a recent amendment to § 53a-193; see Public Acts 2004, No. 04-139, § 2; evinces a clear legislative intent broadly to deter the proliferation of child pornography. It would be contrary to the public policy embodied in that amendment to overrule *Ehlers*.

The evidence also established that the defendant did so fully intending and knowing that Danuta333 would receive the images by accessing her electronic mailbox in this state. In such circumstances, it would be entirely illogical to conclude that the person responsible for sending the electronic mail transmission containing the offending images is not a person engaged in the proscribed activity of "importing" those images into this state within the meaning of § 53a-196c (a). We therefore reject the defendant's claim.[40]

D

The defendant next argues that there was insufficient evidence to support his conviction of attempt to entice a minor because the state failed to prove that he believed that he was communicating with a person under the age of sixteen. We reject this claim for the same reasons that we already have rejected the identical claim in connection with the defendant's challenge to the evidentiary sufficiency of his conviction of attempt to commit sexual assault in the second degree. See part II A of this opinion.

III

The defendant contends that the statutes defining the crimes of attempt to commit sexual assault in the second degree

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[40] The defendant also asserts that the state failed to prove that he "knowingly" imported child pornography "of known content and character" into the state, in accordance with § 53a-196c, because the evidence was insufficient to establish that the photographs: (1) depicted a real person; (2) under the age of sixteen; and (3) in a live performance before an audience. In support of this assertion, the defendant relies on the same arguments that he raised in connection with his challenge to the sufficiency of the evidence that the state offered to prove a violation of § 53a-196c (a). We reject the defendant's claim for the same reasons that we rejected his other claims in this subpart of the opinion.

and attempt to commit risk of injury to a child are void for vagueness as applied to the facts of this case.[41] We disagree.

Our resolution of the defendant's claims is governed by well established principles. "A statute is not void for vagueness unless it clearly and unequivocally is unconstitutional, making every presumption in favor of its validity. . . . To demonstrate that [a statute] is unconstitutionally vague as applied . . . the [defendant] . . . must . . . demonstrate beyond a reasonable doubt that [he] had inadequate notice of what was prohibited or that [he was] the victim of arbitrary and discriminatory enforcement. . . . [T]he void for vagueness doctrine embodies two central precepts: the right to fair warning of the effect of a governing statute . . . and the guarantee against standardless law enforcement. . . . If the meaning of a statute can be fairly ascertained a statute will not be void for vagueness since [m]any statutes will have some inherent vagueness, for [i]n most English words and phrases there lurk uncertainties. . . . References to judicial opinions involving the statute, the common law, legal dictionaries, or treatises may be necessary to ascertain a statute's meaning to determine if it gives fair warning. . . .

"The general rule is that the constitutionality of a statutory provision being attacked as void for vagueness is determined by the statute's applicability to the particular facts at issue. . . . To do otherwise, absent the appearance that the statute in question intrudes upon fundamental guarantees, particularly first amendment freedoms, would be to put courts in the undesirable position of considering every conceivable situation which might possibly arise in the application of [the statute]. . . . Thus,

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[41] The defendant raises the same arguments in support of his challenges to the crime of attempt to commit sexual assault in the first degree and to the crime of attempt to commit risk of injury to a child. We therefore address the defendant's two claims together.

outside the context of the first amendment, in order to challenge successfully the facial validity of a statute, a party is required to demonstrate as a threshold matter that the statute may not be applied constitutionally to the facts of [the] case." (Internal quotation marks omitted.) *State* v. *Lewis*, 273 Conn. 509, 514–15, 871 A.2d 986 (2005). Furthermore, "[a] statute is not unconstitutional merely because a person must inquire further as to the precise reach of its prohibitions . . . ." *Packer* v. *Board of Education*, 246 Conn. 89, 101, 717 A.2d 117 (1998). "[N]or is it necessary that a statute list the exact conduct prohibited." Id. In light of these principles, "our fundamental inquiry is whether a person of ordinary intelligence would comprehend that the defendant's acts were prohibited under [the pertinent provisions of our Penal Code]." (Internal quotation marks omitted.) *State* v. *Jason B.*, supra, 248 Conn. 557.

We turn now to the merits of the defendant's claim, which implicates both of the precepts that underlie the prohibition against unduly vague criminal statutes. First, the defendant maintains that a person of ordinary intelligence would not have understood that traveling to a public place to meet the person the defendant believed was Danuta333 would have constituted a substantial step in furtherance of the crimes of attempt to commit sexual assault in the second degree and attempt to commit risk of injury to a child. Second, the defendant contends that both of those crimes allow for discriminatory and arbitrary law enforcement in the circumstances that gave rise to this case, namely, an Internet sting operation devised to investigate the sexual exploitation of children. Neither of the defendant's arguments has merit.

With respect to the defendant's first contention, we previously have explained that a significant majority of courts have concluded that a suspect who arranges to meet a child for the purpose of having sex with that child and who travels to a

prearranged location to meet that child reasonably may be found to have undertaken a substantial step toward the commission of the crime of attempt to commit statutory rape. See part II A of this opinion. The fact that those courts have taken that position—a position with which we agree—alone provides a sufficient basis for rejecting the defendant's constitutional vagueness challenge because the defendant must be deemed to be on notice of that body of case law.

Furthermore, it was neither unforeseeable nor unreasonable that the jury would conclude that the defendant's conduct constituted "a substantial step in a course of conduct planned to culminate in his commission of the crime[s]" of sexual assault in the second degree and risk of injury to a child. General Statutes § 53a-49 (a) (2). After numerous conversations in which the defendant repeatedly and graphically expressed his desire *and his intent* to have sex with Danuta333 upon meeting her, the defendant twice traveled to Connecticut from Massachusetts for that purpose. Indeed, the defendant was well aware of the impropriety of his conduct, which culminated in his travel to Connecticut. It strains credulity to maintain that a person of reasonable intelligence would not believe that traveling to meet a child under those circumstances represented a substantial step toward the culmination of his ultimate goal of having sexual relations with the child.

The defendant further maintains that the statutes defining the challenged offenses are unconstitutionally vague as applied to him because they vest "the police with unprecedented power to control and shape criminal prosecutions." Specifically, the defendant contends that if Wardwell had identified Danuta333 as being twelve years, eleven months and twenty-nine days old, rather than thirteen years old, the defendant could have been charged with attempt to commit sexual assault in the first degree. We do not quarrel with the defendant's contention that,

if Wardwell had posed as a twelve year old girl, and if the defendant had conducted himself as he did in pursuing a sexual relationship with Danuta333, he would have been subject to prosecution for the greater offense of attempt to commit sexual assault in the first degree. We do not agree, however, that the possibility of such a scenario supports the defendant's vagueness claim. It is undisputed that the police are authorized to conduct sting operations of the kind that was conducted in the present case. Although the police may not entrap an otherwise innocent person; see General Statutes § 53a-15;[42] they may ensnare a person already inclined to violate the law.[43] The latter scenario best characterizes what occurred in the present case. The police provided the defendant with an opportunity that he had been looking for, and he took it. The fact that the state then prosecuted the defendant for the crimes that he had attempted to commit does not render the statutes defining those crimes unconstitutionally vague.

IV

The defendant next argues that the trial court improperly instructed the jury with respect to the crimes of attempt to commit sexual assault in the second degree, attempt to commit of risk of injury to a child, importing child pornography, and obscenity. We reject the defendant's claims, which we address in turn.

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[42] General Statutes § 53a-15 provides: "In any prosecution for an offense, it shall be a defense that the defendant engaged in the proscribed conduct because he was induced to do so by a public servant, or by a person acting in cooperation with a public servant, for the purpose of institution of criminal prosecution against the defendant, and that the defendant did not contemplate and would not otherwise have engaged in such conduct."

[43] The defendant did not claim that the state had entrapped him with respect to any of the crimes with which he was charged.

Before considering the merits of those claims, however, we set forth the standard of review applicable to such claims. "In determining whether it was . . . reasonably possible that the jury was misled by the trial court's instructions, the charge to the jury is not to be critically dissected for the purpose of discovering possible inaccuracies of statement, but it is to be considered rather as to its probable effect upon the jury in guiding [it] to a correct verdict in the case. . . . The charge is to be read as a whole and individual instructions are not to be judged in artificial isolation from the overall charge. . . . The test to be applied . . . is whether the charge, considered as a whole, presents the case to the jury so that no injustice will result." (Internal quotation marks omitted.) *State* v. *Reynolds*, 264 Conn. 1, 128, 836 A.2d 224 (2003), cert. denied, 541 U.S. 908, 124 S. Ct. 1614, 158 L. Ed. 2d 254 (2004). "As long as [the instructions] are correct in law, adapted to the issues and sufficient for the guidance of the jury . . . we will not view the instructions as improper." (Internal quotation marks omitted.) *State* v. *West*, 274 Conn. 605, 656, 877 A.2d 787 (2005).

A

We first consider the defendant's challenge to the trial court's instructions on the crime of attempt to commit sexual assault in the second degree. The defendant's sole contention is that those instructions permitted the jury to find the defendant guilty of that offense on the basis of "knowing" conduct rather than "intentional" conduct. We disagree.

The following additional facts are necessary to our resolution of the defendant's claim. Prior to instructing the jury on each specific count of the information, the court instructed the jury on intent as follows: "I want to instruct you on the subject of criminal intent, which is a fact which you must determine and which the state must prove beyond a reasonable doubt as to each crime charged. Intent relates to a condition of

the mind of the person who commits the act, his purpose in doing it. As defined by our statute, a person acts intentionally with respect to a result or to conduct when his conscious objective is to cause such result or to engage in such conduct. Intentional conduct is purposeful conduct rather than conduct that is accidental or inadvertent.

"Intent's a mental process, and what a person's purpose, intention or knowledge has been is usually a matter to determine—to be determined by inference. No person is able to testify that she or he looked into another's mind and saw there a certain purpose or intention. The only way in which a jury can ordinarily determine what a person's purpose, intent or knowledge was, at any given time, is by determining what that person's conduct was, and what the circumstances were surrounding that conduct, and from that, infer what his purpose, intention or knowledge was. This inference is not a necessary one. That is to say, you're not required to infer intent from an accused's conduct, but it is an inference that you may draw if you find it is a reasonable and logical one."

The court proceeded to read § 53a-71 (a) and then instructed the jury on the elements of that offense. Thereafter, the court read the relevant portion of the attempt statute. The court continued: "Insofar as [attempt] applies to this charge, the statute sets up two elements, both of which must be established beyond a reasonable doubt in order to justify a verdict of guilty. First, the defendant must have acted with the kind of intent required for commission of the crime which he was attempting, namely sexual assault in the second degree; and second, acting with that intent, he did something, or he omitted to do something, which, under the circumstances as he believed them to be, was an act or omission constituting a substantial step in a course of conduct planned to end in his commission of the crime. "I'm going to go through each of these two elements with you now in detail. The first element is intent. An attempt

is an act or omission done with the intent to commit some other crime, in this case, sexual assault in the second degree. Thus, the defendant . . . must have acted with the intent to commit the crime of sexual assault in the second degree. It's not enough to show that he acted intending to do some unspecified criminal act. He must have acted with the same intent, the same state of mind, required for that particular crime, which I have just explained to you a few moments ago. I refer you to my earlier charge, general charge on intent, that is what it means, how it may be proven, and what the intent is that is required for the crime of sexual assault in the second degree. And I instruct you to apply that charge here." The court further noted that the sexual assault claim was based on the state's allegations that the defendant had "traveled to New Britain for the purpose of engaging in sexual intercourse with a person he believed to be a thirteen year old female."

The defendant claims that the trial court's use of the word "knowledge" in its explanation of intent suggested that "knowledge" and "intent" are synonymous. The defendant further contends that, because those terms have different meanings,[44] and because the state bore the burden of establishing that the defendant's conduct was intentional, and not merely knowing, the court's instruction on intent was constitutionally infirm.

We reject the defendant's claim because there is no reasonable possibility that the jury was misled by the court's

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[44] For example, under our Penal Code, "[a] person acts 'intentionally' with respect to a result or to conduct described by a statute defining an offense when his conscious objective is to cause such result or to engage in such conduct . . . ." General Statutes § 53a-3 (11). By contrast, "[a] person acts 'knowingly' with respect to conduct or to a circumstance described by a statute defining an offense when he is aware that his conduct is of such nature or that such circumstance exists . . . ." General Statutes § 53a-3 (12).

charge on intent. Although there is a difference between knowledge and intent, the court read the statutory definition of intent, not the statutory definition of knowledge. See footnote 44 of this opinion. Moreover, the court used the term "knowledge" only in connection with its explanation that a person's state of mind generally can be inferred from conduct. Thus, although the instruction did indicate correctly that intent, knowledge and purpose are all states of mind, the court never suggested, contrary to the defendant's claim, that knowledge and intent are synonymous. Consequently, the defendant's claim is without merit.

B

The defendant next challenges the propriety of the trial court's charge on attempt to commit risk of injury to a child. The crux of the defendant's claim is that the trial court failed to convey adequately to the jury the intentionality element of that offense. We disagree.

Our resolution of the defendant's claim requires that we set forth the relevant portions of the trial court's instructions on the crime of attempt to commit risk of injury to a child under both subdivision (1) and subdivision (2) of § 53-21 and under § 53a-49. See footnotes 2 through 4 of this opinion. The court first instructed the jury on risk of injury to a child under subdivision (2), which the court characterized for the jury as risk of injury to a child by sexual contact. The court commenced its instructions on that offense by reading the relevant portion of § 53-21 (2). The court thereafter explained the elements of the offense in relevant part: "First, the state must prove [that] the child was under the age of sixteen at the time of the alleged incident. . . . Second, the state must prove that the defendant had contact with the intimate parts of the victim or subjected the victim to contact with his intimate parts. 'Intimate parts' means the genital area, groin, anus, the inner thighs, the

buttocks or the breasts. 'Contact' means the touching of intimate parts. The state must prove either that the defendant had contact with the child's genital area, groin, anus, inner thighs, buttocks or breasts, or that the defendant caused the child to make contact with the defendant's intimate parts. . . .

"Now third, the state must prove that the contact with the intimate parts took place in a sexual and indecent manner, which was likely to impair the health or morals of the child. That's as opposed to an innocent touching or an accidental or inadvertent or reflexive touching. 'Sexual' means having to do with sex, and 'indecent' means offensive to good taste or public morals. The state must also show that the contact, which was sexual and indecent in nature, was likely to injure or weaken the health or morals of the child. . . .

"The state does not have to prove that the defendant actually did impair the health or morals of the child; rather, the state must show that the defendant's behavior was likely to impair the child's health or morals. 'Likely' means in all probability or probably. There is no requirement that the state prove actual harm to a child's health or morals.

"Likewise, the defendant need not have the specific intent to impair the health or morals of the child, only the general intent to perform the sexual and indecent act. General intent is the intent to do that which the law prohibits. It's not necessary for the state to prove that the defendant intended the precise harm or the precise result which eventuated. In other words, general intent is at least an intention to make the bodily movement which constitutes the act that the crime requires. Therefore, where the definition of a crime requires some forbidden act by the defendant, in this case, an act likely to impair the health or morals of a child, the defendant's bodily movement, to qualify as an act, must be voluntary."

The court next explained that the elements of attempt were the same that it just previously had explained for the crime of attempt to commit sexual assault in the second degree and instructed the jury "to apply the same principles . . . in determining whether the state has proven the [defendant] guilt[y] of this separate charge . . . ." The court finally stated that charges were predicated on the state's allegation that the defendant "traveled to New Britain for the purpose of having contact with the intimate parts of a person he believed to be a thirteen year old female."

With respect to the charge of attempt to commit risk of injury to a child in violation of §§ 53-21 (1) and 53a-49 (a) (1), the court instructed the jury in relevant part: "[Section 53-21 (1)] provides that '[a]ny person who wilfully or unlawfully causes or permits any child under the age of sixteen years to be placed in such a situation that the health of such child is likely to be injured or the morals of such child are likely to be impaired,' shall be punished.

"To prove a defendant guilty of wilfully or unlawfully causing or permitting any child under sixteen years to be placed in such a situation that the health of such child is likely to be injured or the morals of such child are likely to be impaired, the state must prove the following elements beyond a reasonable doubt: First . . .at the time of the incident, the alleged victim was under the age of sixteen years . . . . [Second] . . . the defendant wilfully or unlawfully caused or permitted the victim to be placed in situations that were likely to injure her health or impair her morals. The conduct to be punished must involve a child under the age of sixteen. The statute also requires wilfulness or unlawfulness in causing or permitting the child to be placed in a situation that her health is likely to be injured or her morals are likely to be impaired. This is the conduct of a person that is deliberately indifferent to or acquiesces in, or creates a situation which is inimical or harmful to the [child's]

moral or physical welfare. Furthermore, the term 'health' also applies to the victim's mental health or psychological well-being.

" 'Wilfully,' as used in this statute, means intentionally or deliberately. 'Unlawfully,' as it's used in this statute, means without a legal right or justification. Causing or permitting a situation to arise within the meaning of this statute requires conduct [on] the part of the defendant that brings about or permits that situation to arise when he had such control or a right of control over the child, then he might have reasonably prevented it. . . .

"With regard to the mental state or intent required to commit this offense, the state must also prove beyond a reasonable doubt that the defendant had the general intent to perform the act. General intent is the intent to do that which the law prohibits. It is not necessary for the state to prove [that] the defendant intended the precise harm or the precise result which eventuated. In other words, general intent is at least an intention to make the bodily movement which constitutes the act which the crime requires. Therefore, where the definition of a crime requires some forbidden act by the defendant, in this case, an act likely to impair the health or morals of the child, the defendant's bodily movement, to qualify as an act, must be voluntary. . . . [I]n this case, the state does not claim that the defendant actually committed the crime of risk of injury to a [child]; rather, it claims that the defendant attempted to commit that crime. . . . [The applicable] attempt statute provides that '[a] person is guilty of an attempt to commit a crime if, acting with the kind of mental state required for commission of the crime, he intentionally engages in conduct which would constitute the crime if the attendant circumstances were as he believes them to be.'

"The first element [that] the state must prove beyond a reasonable doubt is that the defendant had the kind of mental state required for the commission of the crime of risk of injury to a [child]. So, there must be the intent. The intent for that crime is the general intent to do that which the law prohibits, that is, the intent to cause or permit a situation to arise that is likely to injure her health or impair her morals.

"Next, the state must prove beyond a reasonable doubt that the defendant intentionally engaged in conduct that would have constituted the crime of risk of injury to a [child] if the attendant circumstances were as he believed them to be. In other words, the state must prove both intent and conduct beyond a reasonable doubt to obtain a conviction of attempt to commit risk of injury to a [child] under this attempt statute. . . .

"The state claims that this crime, too, was committed on or about March 8, 2000 [and on or about March 14, 2000] when [the state] alleges that [the defendant] . . . traveled to New Britain for the purpose of placing a person he believed to be a thirteen year old female in a situation that was likely to injure her health or to impair her morals." With these instructions in mind, we turn to the defendant's claims of instructional impropriety.

The defendant maintains that the trial court, in instructing the jury concerning the crime of attempt to commit risk of injury to a child under §§ 53-21 (2) and 53a-49 (a) (1), inadequately explained the state's burden of proving that he had intended to have contact with the victim's intimate parts. On the contrary, the court informed the jury that the state had the burden of proving that the attempted contact was of a "sexual and indecent" nature as distinguished from "an innocent touching or an accidental or inadvertent or reflexive touching." The court further instructed the jury that, although the state was not required to prove that the defendant had attempted to

engage in such touching with the specific intent to harm the child—i.e., the state was not required to prove that the defendant himself believed that such sexual or indecent touching would be harmful to the victim—the state *was* required to demonstrate that the touching would cause such harm *and* that the touching itself was intentional. Finally, the court explained that the charge was predicated on the state's allegation that the defendant had traveled to New Britain "*for the purpose* of having contact with the intimate parts of a person he believed to be a thirteen year old female." (Emphasis added.) The court's instructions on attempt reinforced the point that the state was required to establish that the defendant's conduct was intentional. Contrary to the defendant's claim, the challenged instructions were adequate.

We also reject the defendant's similar claim regarding the impropriety of the court's instructions on the crime of attempt to commit risk of injury to a child under §§ 53-21 (1) and 53a-49 (a) (1). The court instructed the jury that, to prove a violation of § 53-21 (1), the state was required to establish that the defendant *wilfully* had caused the victim to be placed in a situation inimical to her health and well-being. The court defined "wilfully" as "intentionally or deliberately." The court also underscored the fact that the state bore the burden of establishing that the "forbidden act" was voluntary. In addition, the court reiterated that the charges were predicated on the state's allegation that the defendant had traveled to New Britain "*for the purpose* of placing a person he believed to be a thirteen year old female in a situation that was likely to injure her health or to impair her morals." (Emphasis added.) Finally, the court properly instructed the jury on attempt, once again noting the intentionality element of § 53a-49 (a) (1). In light of the foregoing, we conclude that the trial court's instructions concerning the crime of attempt to commit risk of injury to a child under §§ 53-21 (1) and 53a-49 "were correct in law,

adapted to the issues and sufficient for the guidance of the jury . . . ." (Internal quotation marks omitted.) *State* v. *West*, supra, 274 Conn. 656.

C

The defendant also claims that the trial court improperly instructed the jury on the crime of importing child pornography. In particular, the defendant takes issue with that portion of the charge in which the court explained the operation of General Statutes (Rev. to 1999) § 53a-196c (b), which provides that "[i]mportation of two or more copies of any publication containing child pornography shall be prima facie evidence that such publications were imported with intent to promote child pornography."[45] The defendant claims that the court's instruction was improper because the term "copy," for purposes of § 53a-196c (b), means two reproductions of the same image, not reproductions of two different images, and because the state adduced no evidence to support the court's charge under that interpretation of § 53a-196c (b).[46]

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[45] The court instructed the jury in relevant part: "The statute making it a crime to import child pornography in Connecticut . . . provides, as to [the] element of intent, that the importation of two or more copies of any publication containing child pornography shall be . . . prima facie evidence that such publications were imported with intent to promote child pornography. What this means is that if there's evidence that the [defendant] imported into Connecticut or caused to be imported into Connecticut two or more copies of anything that is child pornography . . . that evidence by itself is sufficient to prove that the child pornography was imported by the [defendant] with the intent to promote child pornography."

[46] Although the two photographs that the state relied on to establish the charge of importing child pornography depicted the same young, partially nude girl, each of the photographs depicted the girl in a slightly different pose.

We are not persuaded by the defendant's contention. Neither the language of § 53a-196c nor its purpose of prohibiting the importation of child pornography into this state supports the defendant's claim that the two copies must be of the same image before the state may obtain the benefit of § 53a-196c (b).[47] Moreover, construing § 53a-196c (b) in the narrow manner advocated by the defendant would yield a bizarre result. The provision would apply to the case of an accused charged with importing two copies of the same pornographic image but not to the case of an accused charged with importing thousands of different pornographic images. We see no reason why the legislature would have intended to create such a seemingly irrational distinction. It is apparent, rather, that § 53a-196c (b) was enacted by the legislature because of the legislature's special concern with persons who cause multiple images of child pornography to be imported into this state. The trial court's instruction, therefore, was proper in law and warranted by the evidence.

D

The defendant's final claim of instructional impropriety involves the trial court's charge on the crime of obscenity. The

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[47] In support of his claim, the defendant cites to several instances during a debate of the bill that eventually became § 53a-196c in which several members of the House of Representatives used the term "two copies" in referring to the kinds of materials that are prohibited under the legislation. See, e.g., 28 H.R. Proc., Pt. 16, 1985 Sess., pp. 5674, 5685, remarks of Representatives Richard D. Tulisano and William J. Cibes, Jr. A review of those proceedings, however, reveals that the discussion did not focus on whether the copies had to be of the same image; rather, the discussion dealt more generally with what constitutes child pornography under the law. We note, moreover, that, at an earlier stage in the legislative debate, Representative James T. Fleming referred to the provision as giving rise to a prima facie case when "two or more items" of child pornography have been brought into this state. Id., p. 5672.

defendant maintains that the trial court improperly denied his request for an instruction that the jury could not return a verdict of guilty on that charge unless it unanimously agreed that a particular image or group of images was obscene. The defendant further maintains that the court's general instructions on unanimity were inadequate to guide the jury in its deliberations on the obscenity charge and that the court effectively sanctioned a nonunanimous verdict on that charge by declining to give the requested instruction.[48] We disagree.

As a general matter, in reviewing a claim that the trial court improperly failed to give a specific unanimity instruction, "we first review the instruction that was given to determine whether the trial court has sanctioned a nonunanimous verdict. If such an instruction has not been given, that ends the matter. Even if the instructions at trial can be read to have sanctioned such a nonunanimous verdict, however, we will remand for a new trial only if (1) there is a conceptual distinction between the alternative acts with which the defendant has been charged, and (2) the state has presented evidence to support each

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[48] The defendant does not otherwise challenge the propriety of the trial court's charge on the crime of obscenity. With respect to that charge, the court instructed the jury "to consider all of the images which [the defendant] allegedly sent by the Internet to Danuta333 . . . [including the two photographs that formed the basis of the charge of importing child pornography] . . . as well as the other still and moving images which have been shown to you and about which you have heard testimony." The court also instructed the jury that it "may . . . consider the content of the [instant messaging] chats [between Danuta333 and the defendant] . . . in determining whether [the defendant] is guilty or not guilty of the crime of obscenity." The court provided the jury with the definition of obscene materials and instructed the jury to apply "contemporary community standards" in its deliberations on the obscenity charge.

alternative act with which the defendant has been charged."[49] *State* v. *Famiglietti*, 219 Conn. 605, 619–20, 595 A.2d 306 (1991); accord *State* v. *Ceballos*, 266 Conn. 364, 419, 832 A.2d 14 (2003). In the present case, the trial court did not give an instruction expressly sanctioning a nonunanimous verdict on the charge of obscenity. The defendant claims that the court nevertheless sanctioned a nonunanimous verdict on the obscenity charge because it instructed the jury to consider all of the images and conversations that had been introduced into evidence by the state; see footnote 48 of this opinion; without also directing the jury that it must agree unanimously on the obscene nature of any particular item.

We conclude that the trial court's general instructions on unanimity were adequate. Although the state charged the defendant with only one count of obscenity, the evidence on which the state relied to prove that count consisted of a variety of different materials. In other words, the state sought to establish that those materials, considered collectively, were sufficient to establish a violation of § 53a-194. In the absence of anything in the record to indicate that the defendant challenged the manner in which the state sought to prove the obscenity charge, we see no reason to second guess either the manner in which the state proceeded in proving the obscenity charge or the manner in which the court instructed the jury with respect to that offense. In particular, the defendant did not challenge the obscenity count on grounds of duplicity; see, e.g., *State* v. *Browne*, 84 Conn. App. 351, 380–81, 854 A.2d 13 ("[d]uplicity occurs when two or more offenses are charged in

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[49] We note that the issue of whether the trial court improperly sanctioned a nonunanimous verdict by failing to give a specific unanimity charge generally arises in cases involving a claim that criminal liability has been premised on the violation of one of several alternative subsections of a statute. See, e.g., *State* v. *Ceballos*, 266 Conn. 364, 419, 832 A.2d 14 (2003); *State* v. *Famiglietti*, 219 Conn. 605, 619–20, 595 A.2d 306 (1991).

a single count of the accusatory instrument" [internal quotation marks omitted]), cert. denied, 271 Conn. 931, 859 A.2d 930 (2004); even though the state expressly alleged, with respect to that count, that the defendant had "disseminate[d] obscene material" "*on or about divers*[*e*] *dates* between January and February, 2000, in the city of New Britain . . . ."[50] (Emphasis added.) In such circumstances, the state was entitled to have the jury consider the evidence as a whole in connection with its deliberations on the obscenity charge. In light of the trial court's unanimity instruction, it is clear that each and every juror found, at the very least, that the materials introduced into evidence, considered together, were obscene. The defendant's claim, therefore, must fail.[51]

V

The defendant next claims that § 53a-196c does not apply to images of child pornography transmitted by personal computer and that the legislature intended to prohibit only the commercial importation of child pornography. We disagree with both of the defendant's contentions.

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[50] We note that the defendant may not have challenged the obscenity count on duplicity grounds for reasons of strategy, namely, to avoid the risk of being charged with multiple counts of obscenity.

[51] The defendant also contends that the evidence was insufficient to permit a finding of guilty of obscenity. The defendant, however, has not further articulated the basis of his claim because, he maintains, he is unable to do so by virtue of the trial court's allegedly improper refusal to give a specific unanimity instruction on the obscenity charge. According to the defendant, the court's refusal to give such an instruction has "effectively deprived" him of his right to challenge the sufficiency of the evidence on the charge because, the defendant asserts, there is "no way of ascertaining the factual basis" of his conviction. In light of our rejection of the defendant's claim concerning the impropriety of the court's instructions on the crime of obscenity, we also reject his unsubstantiated claim of evidentiary insufficiency with respect to that charge.

The defendant's first claim is not consistent either with the language or the purpose of § 53a-196c. By its terms, § 53a-196c applies to anyone who, with intent to promote child pornography, knowingly imports or causes to be imported into this state three or more visual depictions of child pornography of known content and character. The term "child pornography" means "*any material* involving a live performance or *photographic or other visual reproduction* of a live performance which depicts a minor in a prohibited sexual act." (Emphasis added.) General Statutes (Rev. to 1999) § 53a-193 (13).[52] Similarly, the term "promote" is expansively defined to mean "manufacture, issue, sell, give, provide, lend, mail, deliver, transfer, transmit, publish, distribute, circulate, disseminate, present, exhibit, advertise, produce, direct or participate in." General Statutes § 53a-193 (12). The legislature's use of such language connotes an intent to prohibit broadly the dissemination of child pornography in this state consistent with the abhorrent nature of such material.

As we indicated in *State* v. *Ehlers*, supra, 252 Conn. 579, our child pornography laws were designed to "protect the victims of child pornography and [to] destroy the market for child pornography." (Internal quotation marks omitted.) Id., 593. In light of those two overarching goals, it would be contrary to the purpose of those laws to restrict their reach in

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[52] We note that § 53a-193 (13) recently has been amended. See Public Acts 2004, No. 04-139, § 2. The current statutory definition of "child pornography" now *expressly* covers "any visual depiction, including any photograph, film, videotape, picture or computer-generated image or picture, whether made or produced by electronic, mechanical or other means, of sexually explicit conduct, where the production of such visual depiction involves the use of a person under sixteen years of age engaging in sexually explicit conduct, provided whether the subject of a visual depiction was a person under sixteen years of age at the time the visual depiction was created is a question to be decided by the trier of fact." General Statutes § 53a-193 (13).

the manner urged by the defendant. Although it may be true that the legislature did not fully envision all of the ways in which child pornography might be introduced into this state when it enacted the antichild pornography legislation in 1985; see Public Acts 1985, No. 85-496, § 5; the language of the legislation that it crafted is sufficiently broad to address the dissemination of such pornography in ways not necessarily contemplated by the legislature at that time, including via the Internet. Cf. *State* v. *McVeigh*, 224 Conn. 593, 614, 620 A.2d 133 (1993) ("[w]e do not believe that the legislative intent behind the wiretap act was to leave such unknowing third parties unprotected simply because the telephonic technology in such widespread use today was not available in 1971").

For similar reasons, we also reject the defendant's claim that the legislature intended to prohibit only the importation of child pornography that is produced commercially. Again, the defendant's claim founders on both the language and the purpose of the relevant statutory provisions. Although the legislative history of § 53a-196c is replete with references to the intended impact that that legislation would have on the pornography industry,[53] those references reflect but one reason

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[53] For example, Representative James T. Fleming stated: "[The proposed legislation] will enable . . . the [s]tate to hit the wholesaler of child pornography at the source, as the material enters this state. In effect, I think it will make it too expensive for child pornographers to operate in Connecticut." Conn. Joint Standing Committee Hearings, Judiciary, Pt. 7, 1985 Sess., p. 2199. William Wholean, executive director of the Connecticut Catholic Conference stated in support of the proposed legislation: "A favorable report . . . will be the first step in curbing the lucrative pornography business in Connecticut. . . .

"There has been a certain reluctance on the part of police departments and prosecutors to tackle the pornography industry. . . .

"It's time we got the pornography peddlers on the run and away from our children." Id., p. 2334.

for the legislation; there is nothing in the legislative record to suggest that that reason was intended to be exclusive of all others. In contrast to the construction urged by the defendant, an interpretation of § 53a-196c that does not limit its application to the business of child pornography advances the broader legislative purpose of protecting children by targeting the market for child pornography; see *State* v. *Ehlers*, supra, 252 Conn. 596; whatever form that market may take under the circumstances. We therefore reject the defendant's claim.[54]

VI

Finally, the defendant claims that the trial court improperly permitted the state to present expert testimony about the psychological and behavioral characteristics of a certain category of sex offenders. Specifically, the defendant contends that the trial court improperly: (1) permitted that testimony without first conducting a hearing in accordance with *State* v. *Porter*, 241 Conn. 57, 698 A.2d 739 (1997), cert. denied, 523 U.S. 1058, 118 S. Ct. 1384, 140 L. Ed. 2d 645 (1998); and (2) concluded that the testimony was more probative than prejudicial. We reject the defendant's claim.

The following additional facts and procedural history are necessary for our resolution of the present claim. Prior to trial, the state notified the defendant of its intent to present the expert

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[54] The defendant also suggests that, because § 53a-196c "is concerned *solely* with commercial activity . . . that is interstate in nature"; (emphasis in original; internal quotation marks omitted); that provision violates the commerce clause of the United States constitution. See, e.g., *Healy* v. *Beer Institute*, 491 U.S. 324, 336–37, 109 S. Ct. 2491, 105 L. Ed. 2d 275 (1989). As we have explained, however, the assumption underlying the defendant's suggestion, namely, that § 53a-196c pertains only to commercial activity, is incorrect. Moreover, the defendant's activities in the present case were not commercial in nature. For either of those reasons, the defendant's claim fails.

testimony of Kenneth Lanning, a private consultant and former special agent of the Federal Bureau of Investigation (FBI) whose work had focused on the victimization of children.[55] In particular, the state sought to elicit testimony from Lanning about the characteristics of a category of sex offenders known as "preferential offenders . . . ." The defendant filed a motion in limine to exclude the testimony, claiming that the state had failed to demonstrate its admissibility under *Porter* and that the proffered evidence was unduly prejudicial. The trial court denied the defendant's motion, concluding that "the proposed testimony . . . does not qualify as 'scientific evidence' and, therefore, does not require a *Porter* hearing before being presented to the jury." The court, however, expressly limited the scope of Lanning's testimony to "the 'customs and habits' of 'preferential [sex] offenders' in general" and prohibited the state from "attempt[ing] in any way to have . . . Lanning express opinions on the mental state of [the defendant] or whether he fits the characteristics of a 'preferential offender' or how his conduct compares with that of a 'preferential offender.' "[56]

The defendant subsequently renewed his motion immediately before Lanning testified. The trial court reaffirmed its earlier ruling, noting that the testimony was admissible under § 7-2 of the Connecticut Code of Evidence[57] and that its

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[55] Lanning had spent twenty years in the behavioral sciences unit of the FBI.

[56] The parties stipulated that Lanning never had interviewed the defendant personally and had not reviewed any of the evidence relating to the charges against him.

[57] Section 7-2 of the Connecticut Code of Evidence provides: "A witness qualified as an expert by knowledge, skill, experience, training, education or otherwise may testify in the form of an opinion or otherwise concerning scientific, technical or other specialized knowledge, if the testimony will assist the trier of fact in understanding the evidence or in determining a fact in issue."

probative value outweighed its prejudicial effect. With respect to the relevance of the proffered evidence, the court concluded that Lanning's testimony was relevant to "the defendant's intent in engaging in the behavior . . . his belief as to the age of Danuta333 and whether his conduct was corroborative of his purpose as at least the start of a line of conduct leading naturally to the crime." The court also expressly considered the four countervailing factors set forth in *State* v. *Pappas*, 256 Conn. 854, 888, 776 A.2d 1091 (2001),[58] and determined that "none of them either [individually] or together [was] sufficient to outweigh the probative value of . . . Lanning's testimony." Although the court informed the defendant that it would consider a request for a cautionary instruction to minimize any possible prejudice that might flow from Lanning's testimony, the defendant made no such request.[59]

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[58] In *Pappas*, we set forth the following countervailing factors that may militate against the admission of probative evidence: "(1) where the facts offered may unduly arouse the [jurors'] emotions, hostility or sympathy, (2) where the proof and answering evidence it provokes may create a side issue that will unduly distract the jury from the main issues, (3) where the evidence offered and the counterproof will consume an undue amount of time, and (4) where the defendant, having no reasonable ground to anticipate the evidence, is unfairly surprised and unprepared to meet it." (Internal quotation marks omitted.) *State* v. *Papas*, supra, 256 Conn. 888; see also Conn. Code Evid. § 4-3 ("[r]elevant evidence may be excluded if its probative value is outweighed by the danger of unfair prejudice or surprise, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time or needless presentation of cumulative evidence").

[59] We note that a number of other courts also have permitted Lanning's testimony about preferential sex offenders. See, e.g., *United States* v. *Hayward*, 359 F.3d 631, 635–37 (3d Cir. 2004); *United States* v. *Long*, 328 F.3d 655, 665–68 (D.C. Cir.), cert. denied, 540 U.S. 1075, 124 S. Ct. 921, 157 L. Ed. 2d 747 (2003); *United States* v. *Romero*, 189 F.3d 576, 582–87 (7th Cir.1999), cert. denied, 529 U.S. 1011, 120 S. Ct. 1286, 146 L. Ed. 2d 232 (2000); *United States* v. *Cross*, 928 F.2d 1030, 1049–51

Lanning then testified before the jury that sexual offenders fall along a "motivation continuum" ranging from situational sex offenders to preferential sex offenders. According to Lanning, situational sex offenders take advantage of opportunistic situations to engage in sex offenses and are typically thought-driven, undertaking action without consideration of getting caught. Lanning testified further that preferential sex offenders are individuals who have specific sexual preferences for certain activities or victims and whose behavior is normally need-driven or fantasy-driven. Preferential sex offenders typically collect pornography, erotica and mementos relating to their sexual interest or preference and spend a great deal of time and money in fulfilling their sexual needs or fantasies. With respect to preferential sex offenders with an interest in children, they may use child pornography to rationalize abhorrent behavior, fuel and reinforce their sexual arousal or lower a potential victim's inhibitions by conveying the message that other children are doing it. Preferential sex offenders typically will engage in a prolonged and elaborate grooming or seduction process that is designed to exploit and manipulate vulnerable children. Preferential sex offenders may lessen the grooming time by targeting a child who is sexually experienced.

"It is axiomatic that [t]he trial court's ruling on the admissibility of evidence is entitled to great deference. In this regard, the trial court is vested with wide discretion in determining the admissibility of evidence. . . . Accordingly, [t]he trial court's ruling on evidentiary matters will be overturned only upon a showing of a clear abuse of the court's discretion." (Internal quotation marks omitted.) *State* v. *Griffin*,

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(11th Cir.), cert. denied, 502 U.S. 985, 112 S. Ct. 594, 116 L. Ed. 2d 618 (1991), and cert. denied sub nom. *Lodge* v. *United States*, 502 U.S. 1060, 112 S. Ct. 941, 117 L. Ed. 2d 112 (1992).

273 Conn. 266, 274, 869 A.2d 640 (2005). "Because a trial court's ruling under *Porter* involves the admissibility of evidence, we review that ruling on appeal for an abuse of discretion." Id., 275.

We first consider whether the trial court abused its discretion in declining to subject Lanning's testimony to a *Porter* hearing. On appeal, the defendant concedes that Lanning's testimony was not "scientific" but argues that the testimony nevertheless required the trial court to conduct a *Porter* hearing because it was "other specialized knowledge" within the meaning of § 7-2 of the Connecticut Code of Evidence. The state argues that no *Porter* hearing was required because Lanning's testimony was not based on any scientific theory but, rather, on his training and experience in the field of child victimization. We agree with the state that, because Lanning's testimony was not based on scientific knowledge, the trial court properly determined that a threshold admissibility hearing under *Porter* was not necessary.

"In [*Porter*], we adopted the test for determining the admissibility of scientific evidence set forth in *Daubert* v. *Merrell Dow Pharmaceuticals, Inc.*, [509 U.S. 579, 589–92, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993)]. We noted therein two requirements established under *Daubert*. First, [we noted] that the subject of the testimony must be scientifically valid, meaning that it is scientific knowledge rooted in the methods and procedures of science . . . and is more than subjective belief or unsupported speculation. . . . This requirement establishes a standard of evidentiary reliability . . . as, [i]n a case involving scientific evidence, evidentiary reliability will be based upon scientific validity. . . . Second, [we noted that] the scientific evidence must fit the case in which it is presented. . . . In other words, proposed scientific testimony must be demonstrably relevant to the facts of the particular case in which it is offered,

and not simply be valid in the abstract." (Internal quotation marks omitted.) *State* v. *Griffin*, supra, 273 Conn. 275–76.

"In *Porter* we recognized that *Daubert*'s vagueness as to how and when to apply the factors of the test was necessary. . . . In order to maintain flexibility in applying the test, we did not define what constitutes 'scientific evidence.' . . . Consequently, our initial inquiry is whether the [evidence] at issue . . . is the type of evidence contemplated by *Porter*." (Citations omitted; internal quotation marks omitted.) Id., 276.

In the present case, the defendant concedes, and we agree, that Lanning's testimony did not concern scientific knowledge. That conclusion forecloses the defendant's claim that he was entitled to a *Porter* hearing because *Porter* applies only to expert scientific evidence.

The defendant nevertheless asserts that the trial court improperly declined to conduct a *Porter* hearing because Lanning's testimony involved the kind of "specialized knowledge" for which such a hearing is necessary. In essence, the defendant seeks to have us adopt the approach taken by the United States Supreme Court in *Kumho Tire Co., Ltd.* v. *Carmichael*, 526 U.S. 137, 119 S. Ct. 1167, 143 L. Ed. 2d 238 (1999). In *Kumho Tire Co., Ltd.*, the United States Supreme Court held that a trial court's gatekeeping function under *Daubert* applies not only to expert scientific testimony but also to expert testimony based on technical or other specialized knowledge. Id., 149. We decline to consider the defendant's claim, however, because the defendant failed to raise it in the trial court. See, e.g., *Willow Springs Condominium Assn., Inc.* v. *Seventh BRT Development Corp.*, 245 Conn. 1, 48, 717 A.2d 77 (1998) (claims not properly raised before trial ordinarily will not be considered on appeal).

The defendant also maintains that the trial court should have precluded the state from eliciting Lanning's testimony

because the prejudicial effect of that testimony outweighed its probative value. We disagree. "Expert testimony should be admitted when: (1) the witness has a special skill or knowledge directly applicable to a matter in issue, (2) that skill or knowledge is not common to the average person, and (3) the testimony would be helpful to the court or jury in considering the issues." (Internal quotation marks omitted.) *Hayes* v. *Decker*, 263 Conn. 677, 683, 822 A.2d 228 (2003); see also Conn. Code Evid. § 7-2. Furthermore, "[t]he trial court's discretionary determination that the probative value of evidence is not outweighed by its prejudicial effect will not be disturbed on appeal unless a clear abuse of discretion is shown. . . . [B]ecause of the difficulties inherent in this balancing process . . . every reasonable presumption should be given in favor of the trial court's ruling. . . . Reversal is required only whe[n] an abuse of discretion is manifest or whe[n] injustice appears to have been done." (Internal quotation marks omitted.) *State* v. *Dehaney*, 261 Conn. 336, 358, 803 A.2d 267 (2002), cert. denied, 537 U.S. 1217, 123 S. Ct. 1318, 154 L. Ed. 2d 1070 (2003).

The trial court reasonably concluded that Lanning's testimony was relevant and likely to assist the jury in light of the nature of the charges and Lanning's experience and expertise in matters relating to the victimization of children. The court also carefully evaluated the potential prejudicial effect of the testimony and reasonably concluded that its probative value outweighed any such effect. Moreover, the court guarded against the possibility of undue prejudice by limiting the scope of Lanning's testimony to the " 'customs and habits' " of preferential sex offenders in general and by prohibiting Lanning from expressing any opinion either about the defendant's mental state or about whether the defendant fit the profile of a preferential sex offender. We conclude, therefore, that the trial court did not abuse its discretion in

concluding that the probative value of Lanning's testimony outweighed any prejudicial effect.

The judgments are affirmed.

In this opinion the other justices concurred.

APPENDIX B

SUPREME COURT
STATE OF CONNECTICUT

NO. SC 17215

STATE OF CONNECTICUT

v.

JOHN SORABELLA III

MARCH 14, 2006

ORDER

The motion of the defendant, filed February 17, 2006, for reargument and reconsideration, or, in the alternative, for reconsideration en banc, having been presented to the court, it is hereby ordered **DENIED.**

Norcott and Vertefeuille, Js., did not participate in the consideration or decision of the motion.

BY THE COURT,

/s/
Deputy Chief Clerk

Notice Sent: March 14, 2006
Richard Emanuel
Timothy J. Sugrue, Senior Assistant State's Attorney
Hon. Joseph M. Shortall ,
Clerk New Britain J.D. (CR00-0188041/CR00-0188042)
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